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REPORTS
OF
CASES DETERMINED
BY THE
SUPREME COURT
OF THE
STATE OF MISSOURI

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PERRY S. RADER,
REPORTER.

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JUN 26 1918

JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS

HON. WALLER W. GRAVES, Chief Justice.

HON. HENRY W. BOND, Judge,

HON. ROBERT FRANKLIN WALKER, Judge.

HON. CHARLES B. FARIS, Judge.

HON. JAMES T. BLAIR, Judge.

HON. ARCHELAUS M. WOODSON, Judge.

HON. FRED L. WILLIAMS, Judge.

FANK W. McALLISTER, Attorney-General.

J. D. ALLEN, Clerk.

H. C. SCHULT, Marshal.

JUDGES OF THE SUPREME COURT BY DIVISIONS

DIVISION ONE.

HON. HENRY W. BOND, Presiding Judge.
HON. JAMES T. BLAIR, Judge.
HON. WALLER W. GRAVES, Judge.
HON. ARCHELAUS M. WOODSON, Judge.
HON. ROBERT T. RAILEY, Commissioner.
HON. STEPHEN S. BROWN, Commissioner.

DIVISION TWO.

HON. ROBERT FRANKLIN WALKER, Presiding Judge.
HON. CHARLES B. FARIS, Judge.
HON. FRED L. WILLIAMS, Judge.
HON. REUBEN F. ROY, Commissioner.
HON. JOHN TURNER WHITE, Commissioner.

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CASES DETERMINED
BY THE
SUPREME COURT
OF THE
STATE OF MISSOURI
AT THE
APRIL TERM, 1917.

(Continued from Vol. 271.)

In re ASSESSMENT OF COLLATERAL INHERITANCE TAX IN ESTATE OF JAMES D. LANKFORD.

Division Two, July 27, 1917.

1. **FINDING OF FACTS:** By Court Sitting as Jury: Appellate Rule. The findings of fact by the trial court in a jury-waived law case are attended on appeal with the presumptions of verity which clothe the verdict of a jury, and will not be disturbed if supported by any substantial evidence whatever; but if there is no evidence upon which to base such finding, although no instructions were asked or given and no objections or exceptions were taken at the trial, but the point is saved only in the motion for a new trial, the appellate court will interfere.
2. **RESIDENCE:** Intention: How Shown. Residence is largely a matter of intention, and intention is to be deduced from acts and utterances of the person whose residence is in issue.
3. _____: _____: As Manifested by Will: Abandonment. A statement in decedent's will, made in this State shortly before his death in this State, that his residence was at "Marshall, Saline County, Missouri," is a solemn written admission that his residence was at such place; and a further statement that his residence had formerly been at "Pueblo, county of Pueblo and State of Colorado,"

SUPREME COURT OF MISSOURI,**In re Lankford Estate.**

together with the admission, plainly indicate both an abandonment of a former residence and the acquisition of a new one; and the two make out a *prima-facie* case of residence in this State for the purposes of an assessment of a collateral inheritance tax.

4. _____: _____: _____: **Disqualification to Vote.** The fact that, after an absence of thirty years in other states, decedent stated in November that he was not qualified to vote in this State, after his return to the residence of his niece in April, where his will was made and where he died in December, is no contradiction of the solemn admission in his will that he was a resident of this State, for he was not qualified to vote in this State until he had resided here one year.
5. _____: _____: _____: **No Payment of Taxes.** Nor does the fact that, after an absence of thirty years, he paid no personal taxes in this State, contradict the *prima-facie* case made by the will, since his death, after he returned to this State, occurred before he became liable for taxes here. Nor does the fact that he was not assessed for taxes here.
6. **EXAMINATION OF FACTS: Appellate Rule.** All the cases are reviewed, and it is held that the rule that has become firmly fixed in this State is: (a) The findings of facts, either general or special, of a trial court sitting in a jury-waived case at law, will have applied to them in the appellate court the same presumptions of verity which attach to the verdict of a jury in a law case; (b) such findings of fact may be examined by the appellate court if the point that there was no sufficient evidence is properly preserved in the motion for a new trial alone; (c) in such cases an examination as to sufficiency of the evidence may be had in the appellate court, whether or not instructions were asked, given or refused; and (d) such examination will extend only to a determination of the single question whether there is any substantial evidence to sustain the finding of the trial court. If there is such substantial evidence, and if such substantial evidence be merely contradictory, or, if the evidence adduced be such that reasonable men may draw therefrom more than one inference to sustain the judgment, or if the evidence offered reasonably tends to sustain the finding made, such finding is absolutely conclusive upon the appellate court, and it cannot interfere therewith; but if there is no substantial evidence to contradict the *prima-facie* case made out by plaintiff, the appellate court will reverse the finding made by the trial judge for defendant, and remand the cause for a new trial, with instructions that, if the evidence is not materially changed, the finding be for plaintiff.

**Appeal from Saline Circuit Court.—Hon. Samuel Davis,
Judge.**

REVERSED AND REMANDED.

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A. B. Hoy and Orville M. Barnett for appellant.

(1) Sec. 309, R. S. 1909, provides, in effect, that all property passing by will or the intestate laws of the State from any person while a resident of the State, to others than to certain excepted individuals and purposes, shall be subject to an inheritance tax; while the same section limits the inheritance tax payable on the estate of a non-resident to property which shall be within the State at the time of death. In the estate at bar a large part of the personality was at death of testator located outside of the State. By the terms of the will a large part of the estate passes to those whose right to succession is subject to payment of inheritance tax if decedent was domiciled in Missouri; a smaller portion, by reason of being within the State, is subject to tax, if decedent was a non-resident. (2) There is no substantial evidence upon which to base the finding of the trial court to the effect that decedent was a non-resident; and that the only evidence entitled to consideration on that question is conclusive that the testator was at date of death a resident of and domiciled in Saline County, Missouri. (3) The evidence upon which appellant relies as showing residence in this State is found wholly in positive and unqualified declarations in the last will and testament. (a) The weight to be given to such declarations must very much depend upon the particular circumstances of each case. *Smith v. Croom*, 7 Fla. 161; *In re Ayers Estate*, 84 Neb. 16; *Ennis v. Smith*, 14 How. 400; *Wilson v. Terry*, 9 Allen (Mass.), 214; *Christye on Inheritance Taxation*, p. 824; 14 Cyc. 864. (b) The probative force of such declaration is increased by the appointment of executor for the declared purpose of executing testator's will in the same jurisdiction of which he declares himself to be a resident. *Merrill v. Morrisett*, 76 Ala. 440; 4 Ency. Evidence, 862. (c) The whole tenor of a will may be such that it is inconsistent with the idea of testator's residence abroad. *Cruger v. Phelps*, 47 N. Y. 61. (4) Conceding every word of the testimony to be true, there is nothing therein overcoming the strong *prima-facie*

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proof of residence contained in the declarations made by testator himself under the solemn sanction of his last will and testament. (5) Domicile of deceased is established in Missouri as of April 12, 1912, and such domicile is presumed to have continued without clear proof of abandonment, and the setting up of a new domicile outside the state. Ramey v. Dayton, 77 Mo. 682; 14 Cyc. 859; In re Coulton's Estate, 128 Iowa, 542; Anderson v. Watts, 138 U. S. 694; Inhabitants v. Inhabitants, 88 Mass. 508.

Robert M. Reynolds and Albert R. James for respondents.

(1) The finding and judgment of the trial court on a question of fact in a law case, in which no instructions are asked or given, cannot be reviewed or disturbed by the appellate court. Rausch v. Michel, 192 Mo. 293; Jordan v. Davis, 172 Mo. 599; Lewis v. Muse, 130 Mo. App. 201; Sutter v. Raeder, 149 Mo. 307; Bozarth v. Legion of Honor, 93 Mo. App. 564; Easley v. Elliot, 43 Mo. 289; Wilson v. Railroad, 46 Mo. 36; Weilandy v. Lemuel, 47 Mo. 322; Hamilton v. Boggess, 63 Mo. 233; Henry v. Bell, 75 Mo. 194; Harrington v. Minor, 80 Mo. 270 Gaines v. Fender, 82 Mo. 497; Cunningham v. Snow, 82; Mo. 587; Sieferer v. St. Louis, 141 Mo. 586; Swayze v. Bride, 34 Mo. App. 414; O'Howell v. Kirk, 41 Mo. App. 523; Clafin v. Burkhardt, 43 Mo. App. 226; Morgan v. Railroad, 51 Mo. App. 523; Hatton v. St. Louis, 264 Mo. 634; Scarritt Est. v. Casualty Co., 166 Mo. App. 570; Buford v. Moore, 177 S. W. 865; Wilkinson v. Western Union, 163 Mo. App. 71; Prendergast v. Graverman, 166 Mo. App. 33; Strother v. Barrow, 246 Mo. 241; Paxton v. Bonner, 172 Mo. App. 479; Keyser v. Hayes, 190 Mo. App. 380. (2) The determination of a person's residence depends on his intention and his intention must be judged by all the facts and circumstances in connection with his residence. Hall v. Schoeneck, 128 Mo. 661; Stephens v. Larwill, 110 Mo. App. 156; Green v. Beckwith, 33 Mo. 384; Johnson v. Smith, 43 Mo. 449; State

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ex rel. Ramey v. Dayton, 77 Mo. 678; Chariton County v. Moberly, 59 Mo. 238; State ex rel. v. Bunce, 187 Mo. App. 607; Northern v. McGaw, 189 Mo. App. 362; City of Winchester v. Van Meter, 164 S. W. (Ky.) 323. James D. Lankford, not being a resident of Missouri, the cash, bank draft and certificates of stock in foreign corporations, which were in Missouri at the time of his death, merely for safe-keeping and not otherwise, are not subject to the collateral inheritance tax in the State of Missouri. Gilbertson v. Oliver, 4 L. R. A. (N. S.) 953; Cooley on Taxation (3 Ed.), 24; Kirtland v. Hotchkiss, 100 U. S. 491; 37 Cyc. 1561; Matter of Tulane, 51 Hun, 213, 4 N. Y. Supp. 36; 37 Cyc. 1563; Neilson v. Russell, 19 L. R. A. (N. S.) 887; People v. Griffith, 245 Ill. 532; In re Helena, 236 Pa. 213, 46 L. R. A. (N. S.) 1173, 1175 (notes); Dunham v. Trust Co., 193 N. Y. 642; In re Bishop, 82 App. Div. 112, 81 N. Y. Supp. 474; Ross on Inheritance Taxation, sec. 181.

FARIS, J.—This is a proceeding begun in the probate court of Saline County for the purpose of assessing a collateral inheritance tax against the estate of James D. Lankford, deceased. The probate court held that the estate was subject to the tax, but upon an appeal to the circuit court of Saline County and a trial therein of the issues *de novo*, that court found that decedent was not, at the time of his death, a resident of Missouri and therefore his estate was not liable to this tax, and judgment went in favor of the estate. From this judgment an appeal was taken.

The facts shown in evidence are few and simple. The movant for the assessment of this tax (whom for convenience we shall hereinafter designate as plaintiff) offered the will of James D. Lankford (called herein decedent) as containing a solemn admission of the fact of his residence in this State, and after also offering the appraisement and other formal orders, rested. The apposite provisions of the will of decedent are the first and sixth clauses, which run in pertinent part thus:

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"I, James D. Lankford, of Marshall, Saline County, Missouri, formerly of Pueblo, county of Pueblo and State of Colorado, being of sound and disposing mind, revoke all former wills by me made, and now make this, my last will and testament."

The will further provided in the sixth clause thereof that "in the event of the death of either of said legatees the said Belle Lankford, Paris M. Walker, Marian Garrard or Nancy Hagood leaving children or other descendants surviving them (direct descendants) as heirs, then it is my will that my said trustees shall thereupon and thereafter hold said share of such one so dying for the use and benefit of the children or direct descendants of such one who according to the laws of descent and distribution of the State of Missouri shall be entitled as heirs of such one to claim such estate."

It was further provided by other paragraphs of said will that certain trustees to administer further provisions of the will, which provisions are not here pertinent, should be appointed by the circuit court of Saline County, Missouri, or by the judge thereof in vacation, and that the bonds required to be given by the trustees should be made by "some responsible corporation authorized to execute bonds in the State of Missouri as surety." It was further provided in the eighteenth paragraph of said will that in case it became necessary to administer the estate of decedent in the probate court such administration should be had "*in accordance with said trusts and the proper orders of the probate court and the laws of the State of Missouri.*" (Italics ours.)

On the part of the beneficiaries under said will (hereinafter for convenience called defendants) the testimony of but one witness was offered and defendants rested. The whole of the testimony for defendants elicited from the one witness mentioned, is as follows:

"James D. Lankford was my uncle and I was well and intimately acquainted with him during his lifetime. He was born in Saline County, Missouri, and lived here until about thirty years ago, at time which he went to the State of Colorado, took up his residence there, went

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into business in partnership with his brother, Garrett Lankford, and made Colorado his home. This partnership continued until about seven or eight years ago, when it was dissolved. Since that time James D. Lankford, so far as I know, has maintained no permanent home, but has spent a portion of his time in Colorado, Oklahoma, Old Mexico, Kansas and Missouri, probably spending more of his time in Missouri than any other one place. He had large property interests in Oklahoma, Old Mexico, Colorado and Kansas, and would spend a portion of his time each year in these places looking after his interests. He never voted in Missouri or asserted any of the rights of citizenship here since taking up his residence in the State of Colorado thirty years ago. He was never assessed on any property or paid any taxes on any property in Missouri since leaving here thirty years ago. At the time of his death, December 25, 1912, he had been in Marshall, Missouri, with his niece since about the 1st of September, 1912, or about four months. On election day, in November, 1912, knowing that he was a great admirer of Woodrow Wilson, I asked him if he was not going to vote for his friend Wilson and he said 'No, I have no vote here.' He said nothing further in regard to the matter. I did not know of his having any settled home after the dissolution of his partnership in Colorado."

The court made a special finding of facts upon the one question of whether decedent was or was not at the time of his death a resident of Missouri and held that "James D. Lankford, at the time of his death, had not established his domicile in Saline County, Missouri, and was not a resident of said county within the meaning of the statute in such cases made and provided," and thereupon rendered judgment that the estate of decedent was not liable for any tax whatever under the Collateral Inheritance Tax Law. It will be seen therefore that the question of the residence of decedent is the sole question in the case.

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This is a case at law tried before the court sitting as a jury. No instructions were asked or given. The court found against the plaintiff upon the facts, holding that the evidence offered by plaintiff failed to show that decedent at his death was domiciled in Saline County. It is urged that this finding is against the evidence, and we are asked by plaintiff to reverse the case for this reason. Against this contention defendants' learned counsel urge that since the case is a law case, tried before the court without a jury; since no objections or exceptions (save to the overruling of the motion for a new trial) were taken upon the trial, and no instructions were asked, given, or refused, the finding of the learned judge *nisi* is absolutely conclusive upon us here upon appeal.

If there is any substantial evidence to sustain the judgment below, we are required to sustain it. The findings of fact by the learned trial judge in a jury-waived case at law come to us attended by all of the presumptions of verity which clothe the verdict of a jury (38 Cyc. 1946; 2 R. C. L. 206; Woods v. Johnson, 264 Mo. l. c. 293; Hatton v. St. Louis, 264 Mo. 634); and in such case the finding of the trial judge will not be disturbed upon appeal if such finding be supported by any substantial evidence whatever. The rule to be followed in such cases is that while we will not weigh the evidence, we will interfere when there is no evidence whereon to base the judgment, although no instructions are asked, or given. [State ex rel. v. Guinotte, 156 Mo. l. c. 521; Moore v. Hutchinson, 69 Mo. 429; Wilson v. Albert, 89 Mo. l. c. 544; May v. Crawford, 150 Mo. l. c. 528; Garrett v. Greenwell, 92 Mo. l. c. 125; Robbins v. Phillips, 68 Mo. 100; Whitsett v. Ransom, 79 Mo. 258; Hartt v. Leavenworth, 11 Mo. 629; Hubbard v. Fuchs, 164 Mo. l. c. 430.] Applying this rule to the facts before us in the instant case, we think there was no substantial evidence contravening the case made by plaintiff's proof of decedent's solemn written admissions and conclude that the judgment ought to have been for appellant.

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Residence is largely a matter of intention. [Lankford v. Gebhart, 130 Mo. 621.] This intention is to be deduced from the acts and utterances of the person whose residence is in issue. Here by a most solemn ~~Residence.~~ written admission made in the very will by which the property was devised to defendants, decedent said that his residence on the 12th day of April, 1912, was at "Marshall, Saline County, Missouri," and that his former residence had been "Pueblo, county of Pueblo and State of Colorado;" which admission plainly indicated both an *abandonment* of a former or old residence and the *acquisition* of a new one. [Johnson v. Smith, 43 Mo. 499.] There is not a scintilla of proof that decedent ever had a residence in but two states. He was born in Missouri. He went to Colorado, remained there about thirty years, and then in April, 1912, before his death in the December following, came back to Saline County, Missouri, where his relatives live, made his will, thereafter visited divers places where he had financial interests, till September, 1912, when he came back to Saline County, and there remained at the house of his niece till he suddenly died in December, 1912.

The only contention that is made whereon is bottomed any conflict in the evidence which would serve to make applicable here the rule of reliance upon the lower court's finding, is upon the decedent's statement to his nephew Walker that he (decedent) "had no vote in Missouri." Clearly this is no contradiction, for manifestly decedent had never had a domicile in Missouri since he left it thirty years before, until he came back and made his will in April, 1912. He could not vote in November, 1912, for the very simple reason that he had not been domiciled in Missouri for one whole year. So he could truthfully have made the statement attributed to him and yet have been at his death a resident and even a citizen of Missouri. In short, the statement made to the witness Walker by decedent proves nothing, and since the solemn admission made in writing made out a *prima-facie* case for plaintiff, the judgment should have been for plaintiff, unless some evidence came in on the part of defendants

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which was contradictory of it. A reference to all of the evidence offered by defendants, which in fairness we set forth in the statement, discloses that nothing whatever was offered by defendants to disprove the *prima facie* case so made out by decedent's solemn written admission contained in his will.

While not urged upon our attention, we may say in passing that the facts that decedent was not assessed in Saline County and that he paid no taxes therein, are likewise incompetent and of no probative value. If he *had paid* taxes on personal property such fact would have been competent and of some evidentiary weight; but manifestly the fact that he did not do so can be of no aid to us here and was none to the court below. Moreover, we take notice that his death occurred too soon after his taking up residence in this State for him to become liable to pay taxes upon an assessment made at the earliest date thereafter, which was possible under our taxing statutes. Touching the fact that he was not assessed in this State the same principle applies. If he *had procured* an assessment of his personality to be made, such fact would have been of probative value as indicating intention, but the fact of nonassessment can be of no evidentiary value, since no inferences touching it, which wholly affect decedent, can possibly be drawn from it; such failure could have arisen from the inadvertent neglect of the assessor, and certainly we cannot judicially notice that men are accustomed to run after the assessor in order to get their property assessed so that they may pay taxes. The evidence shows moreover that decedent was temporarily absent on June 1, 1912, and so continued till September, following.

It has been held here, in conformity with the rule elsewhere, that there is often a distinction between the word "residence," which is used in the applicatory statute (Sec. 309, R. S. 1909), and the word "domicile." [Johnson v. Smith, 43 Mo. 499; 34 Cyc. 1648; Sec. 8057, R. S. 1909; Hussman v. Druege, 181 S. W. l. c. 118.] If this distinction should, mayhap, exist in this case it

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would open up an interesting question, which we do not find it necessary to pass on here.

II. The troublesome question as to how far this court is warranted in reviewing the evidence in cases at law tried before the court without a jury and ^{Appellate Rule.} wherein no instructions are asked or given, has apparently been ruled along contradictory lines. Particularly is this true as to the earlier cases decided prior to the enactment of what is now section 2083, Revised Statutes 1909, which seems to have been passed in 1871 (Laws 1871, p. 49, sec. 34), and which substantially requires an appellate court to render such judgment as the trial court ought to have given, and such judgment as to the appellate court shall seem according to law.

But however this may be, no settled rule was followed till some thirty-five years ago. [Lionberger v. Pohlman, 16 Mo. App. 392.] A large majority of the early cases held that unless the judgment of the court *nisi* were sustained by substantial evidence, we had power to reverse for this reason alone. [Rennick v. Walton, 7 Mo. 292; Wilson v. Burks, 8 Mo. 446; Hartt v. Leavenworth, 11 Mo. 629; Swan v. Hyde, 9 Mo. 849; Howard v. Coshow, 33 Mo. 118; Heyneman v. Garneau, 33 Mo. 565; Alexander v. Harrison, 38 Mo. 258; Morris v. Barnes, 35 Mo. 412; Blumenthal v. Torini, 40 Mo. 159; McKay v. Underwood, 47 Mo. 185; Garvin's Admr. v. Williams, 50 Mo. 206; Davis v. Fox, 59 Mo. 125.] There are a few early cases, only meagerly reported, however, which seem to hold that in any case at law tried by the court, or by a jury wherein no instructions were asked or given, the finding of facts *nisi* is absolutely conclusive upon the appellate court, regardless of whether there was any evidence whatever in the record to support such finding. [Easley v. Elliott, 43 Mo. 289; Wilson v. Railroad, 46 Mo. 36; Weilandy v. Lemuel, 47 Mo. 322; Hamilton v. Boggess, 63 Mo. l. c. 251.] But by the present rule,

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which is well-settled, we may interfere if the judgment rendered is not supported by substantial evidence.

It was said in the very early case of Hartt v. Leaveworth, 11 Mo. 629, l. c. 639, that: "We have uniformly declined interfering with the verdict of a jury, or a court sitting as a jury, where the evidence conflicted, and no point of law was raised by instructions. This court undoubtedly possesses the power of ordering a new trial, where the circuit court refuses to grant one, on the sole ground of the verdict being against evidence. It is a power, however, which it has not been thought expedient to exercise, unless in very clear cases. We think the present is a case of this character, there being no evidence whatever in the record to show any title in Crain, from whom the defendant derives his right, except that the box containing the property was marked with his name, and that circumstance is satisfactorily explained."

The above case was one wherein the evidence adduced on plaintiff's part was wholly oral, and while the opinion considered the verdict of a jury, we have seen that the rule is precisely the same as to the presumptions which we here entertain in a case at law whether the judgment is based on a jury's verdict, or upon the finding of the court sitting as a jury. [Woods v. Johnson, 264 Mo. 289, and cases cited *supra*.]

In the case of Pipkin v. Allen, 24 Mo. 520, much of the evidence was oral; in fact, the case turned at last wholly upon testimony of witnesses. Plaintiff being cast below appealed, and this court reversed and remanded the case, saying: "The court below should have sustained the motion to review the finding in regard to the fact about the cancellation of the sale from Boyle to James Anderson. The evidence in this record does not justify or support that finding. When Boyle made his deed to Russell in November, 1813, the contract or sale between himself and James Anderson was manifestly in existence—in force. Anderson died before the date of that deed to Russell. How then became the contract cancelled or rescinded? The finding is not warranted in this particular by what appears to us of record. The judgment must

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be reversed and the cause remanded for further proceedings."

The case of Robbins v. Phillips, 68 Mo. 100, was replevin. The evidence adduced upon the crucial question was all oral. Plaintiff lost and brought error to this court. We reversed it and sent it back for a new trial, saying: "No instructions were asked or given and the question presented is whether the evidence justifies the finding. We are not of opinion that it does, or that it has any tendency in that direction. . . . Judgment reversed and cause remanded."

The case of Whitsett v. Ransom, 79 Mo. l. c. 260, was for damages for assault and battery. Naturally the evidence was wholly oral. Plaintiff being cast appealed. This court in an opinion by PHILIPS, C., reversed and remanded it upon the sole question of the weight of the evidence, saying upon that point this: "The question, therefore, for determination is, whether the record presents such a state of evidence as to justify this court in ordering a *venire de novo*. It is rarely the case that appellate courts interfere with the discretion of the trial courts in directing a new trial on a mere question of weight of evidence. The credibility of witnesses and the probative force of a given fact are peculiarly within the province of the jury. It is only where this court is well satisfied of a palpable disregard of law and evidence on the part of the trial jury, and that the trial court in refusing a new trial has wrought manifest injustice, or shown an unjudicial bias, that it feels it to be its duty to interfere."

The case of Garrett v. Greenwell, 92 Mo. l. c. 125, was an action for damages for burning a threshing machine. The evidence adduced could not therefore have been documentary. Plaintiff being defeated *nisi* appealed. We reversed and remanded the case, saying: "In ordinary cases, where the action is one at law, this court does not interfere in regard to questions of the mere weight of evidence. In this case, however, the evidence is of the most cogent character that Charles Jolioh burned the plaintiff's machine. This evidence is both

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direct and circumstantial, consisting of previous threats, and subsequent admission of the fact of his guilt; his wearing boots which made certain tracks, and those tracks being found the next morning, leading directly from where the machine was burned to within a few yards of his house; his alarmed and excited manner, when visited by a neighbor the next day, and finally his act in changing those boots for others, at the suggestion of another neighbor. Looking at all these things, it is a matter of profound surprise that the jury, with all this evidence before them, could have found as they did. But, inasmuch as they have done so, our duty, under the rule announced in the cases of *Whitsett v. Ransom*, 79 Mo. 258, and *Spohn v. Railroad*, 87 Mo. 74, is clear, and so the judgment is reversed and the cause remanded."

The identical rule upon principle is announced in dozens of other cases decided by us, a few of which we append: *Moore v. Hutchinson*, 69 Mo. 429; *Morris v. Barnes*, 35 Mo. 412; *Baker v. Stonebraker*, 36 Mo. 338; *Wilson v. Albert*, 89 Mo. l. c. 544; *May v. Crawford*, 150 Mo. l. c. 528; *State ex rel. v. Guinotte*, 156 Mo. l. c. 521; *Graney v. Railroad*, 157 Mo. l. c. 680; *Hubbard v. Fuchs*, 164 Mo. l. c. 430; *Morrison v. Bomer*, 195 Mo. l. c. 538; *Woods v. Johnson*, 264 Mo. 289; *Hatton v. St. Louis*, 264 Mo. 634; *Truitt v. Bender*, 193 S. W. 838.

In the case of *State ex rel. v. Guinotte*, *supra*, at page 520, it was said: "Since then, however, this court has made the same ruling as to the verdict of a jury in will contests as that in ordinary trials, to-wit, that such a trial is an action at law, and that this court would not reverse the judgment because the jury found against the weight of the evidence. [*Young v. Ridenbaugh*, 67 Mo. 574.] And in *Appleby v. Brock*, 76 Mo. 314, a similar ruling was made, and also it was ruled in that case that this court would examine the record to see if there is any testimony to support the finding. To like effect is *McFadin v. Catron*, 138 Mo. l. c. 227. The amendment of the statute of 1825 in the particular mentioned, as well as the rulings just quoted, have thus placed a will contest on the same plane as the trial of any other civil action,

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for we have ruled in many cases of ordinary trials that while we will not weigh the evidence in law cases, yet that we will interfere when there is no evidence whereon to base the verdict, although no instructions are asked. [Hartt v. Leavenworth, 11 Mo. 629; Robbins v. Phillips, 68 Mo. 100; Pipkin v. Allen, 24 Mo. 520; Heyneman v. Garneau, 33 Mo. 565; Morris v. Barnes, 35 Mo. 412; McEvoy to use v. Lane, 9 Mo. 49; Wilson v. Albert, 89 Mo. l. c. 544; Baker v. Stonerbraker, 36 Mo. 338; Whitsett v. Ransom, 79 Mo. 258.]"

The books are full of cases of actions to break wills, wherein, as we have over and over again ruled, the proponent of the will pulls the laboring oar (Carl v. Gobel, 120 Mo. l. c. 295; Goodfellow v. Shannon, 197 Mo. l. c. 278; Craig v. Craig, 156 Mo. l. c. 362), yet time after time we have held that verdicts which overturned or "broke" wills, but which had no substantial foundation in the evidence on which to stand, must be reversed—*many times with directions to probate the rejected will.* [Thomasson v. Hunt, 185 S. W. l. c. 169; Hayes v. Hayes, 242 Mo. 155; Winn v. Grier, 217 Mo. 420; Sayre v. Trustees of Princeton University, 192 Mo. 95; Archambault v. Blanchard, 198 Mo. l. c. 425; Story v. Story, 188 Mo. 110; Hamon v. Hamon, 180 Mo. l. c. 702; Byrne v. Byrne, 181 S. W. l. c. 392.]

On the other hand the cases which seem to announce a different rule are for the most part we think fairly easy to reconcile with what we say above, and with what the cases hold which we cite. For example, the case of Buford v. Moore, 177 S. W. l. c. 872, was a case at law tried by the court without a jury. Plaintiff won upon evidence which was contradictory. Held, correctly, that the finding of the trial court upon the facts is conclusive. The learned writer of that opinion did not intend to say that where plaintiff recovers in a case at law tried before the court, the defendant may not challenge the sufficiency of plaintiff's evidence to make out a case. Hamilton v. Boggess, 63 Mo. l. c. 251, is likewise a case at law tried before the court wherein *plaintiff had judgment.* There was a mass of contradictory testimony offered,

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which this court declined to weigh, saying that in such a case we would not pass upon the weight of the evidence. But by way of *dictum*, the learned judge went out of his way to say: "We wish it to be understood that it is not our province to determine facts, or review the finding of juries or courts on them, except in chancery cases."

Certainly the learned jurist who wrote the opinion in the above case did not intend to say that a defendant who lost below cannot in an appellate court challenge the sufficiency of the evidence offered by plaintiff as the basis of the latter's recovery. This case contains the very strongest language we have been able to find upon this point and yet nothing is clearer than that the *obiter dictum* above quoted is palpably wrong.

The case of Chilton v. Nickey, 261 Mo. 232, was a case wherein there was some evidence to uphold the finding *nisi*. So it was correctly ruled by us that in such a case the lower court's finding is conclusive upon the appellate court. [Cunningham v. Snow, 82 Mo. 587.] The case of Morrison v. Bomer, 195 Mo. l. c. 538, which is much quoted and relied on as stating the rule of absolute conclusiveness, does not do so, but on the contrary states the rule thus: "This determination is conclusive upon us if it might reasonably have been reached upon the evidence presented." [Hatton v. St. Louis, 264 Mo. 634.] Similarly are Strother v. Barrow, 246 Mo. l. c. 251; Siefferer v. City of St. Louis, 141 Mo. l. c. 593; Bartlett v. Kauder, 97 Mo. 356; Schad v. Sharp, 95 Mo. 573, and Jordon v. Davis, 172 Mo. l. c. 608, all cases at law wherein plaintiffs prevailed. Moreover, there was in all of them conflicting evidence. So the rule stated in those cases, applied to the facts thereof, is undoubtedly correct, and in nowise militates against the rule we labor to show is correct. Neither do we find any fault with the case of Rausch v. Michel, 192 Mo. l. c. 302, urged upon our attention. There the court said: "This is an action at law. No instructions were asked, given or refused. There is, therefore, no question open for review here except errors apparent upon the record proper, and

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the question whether under the issues the plaintiff made out a prima-facie case.” (Italics ours.) This is likewise the rule stated in Sutter v. Raeder, 149 Mo. l. c. 307. Besides, the above case, in addition to stating the rule correctly, was a case wherein plaintiff recovered below. The rule in such case is too well settled for quibble, discussion or citation of authority.

There are, as we say above, some old cases which while regrettably meager as to the reported facts, seem boldly to announce the rule that regardless of the entire lack of evidence on which to sustain the verdict of a jury, or the judgment of a judge sitting in a jury-waived case at law, such verdict or judgment is conclusive upon us on appeal. [Easley v. Elliott, 43 Mo. 289; Wilson v. Railroad, 46 Mo. 36; Weilandy v. Lemuel, 47 Mo. 322.] While these cases have never been overruled specifically, they have long been ignored in practice. In the first of these cases, namely, Easley v. Elliott, *supra*, *the plaintiff recovered*; yet it was said that defendant could not challenge the sufficiency of the evidence adduced, or object that there was no evidence whatever to support the judgment rendered. No one would be so bold as now to urge such a doctrine as this.

In the case of Lionberger v. Pohlman, 16 Mo. App. I. c. 397, THOMPSON, J., who was both a most learned judge and an able writer upon the substantive law, refers to the change in our holdings upon this question, and thus states the rule: “The rule settled by recent decisions in the Supreme Court and this court is, that where there is no substantial testimony to support the verdict of a jury upon a given issue, the appellate court will reverse a judgment on the verdict.”

This holding of the above learned judge has been followed by the Courts of Appeals with practical unanimity of decision since the rule announced was promulgated. [Wilkinson v. Western Union Tel. Co., 163 Mo. App. 71; Prendergast v. Graverman, 166 Mo. App. 33; Paxton v. Bonner, 172 Mo. App. 479; Keyser v. Hays, 190 Mo. App. 380.]

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We have already seen that we early got away from the strict and crabbed rule of Easley v. Elliott, *supra*, and announced a rule substantially in the language of that Judge THOMPSON sets forth. [Whitsett v. Ransom, *supra*; Garrett v. Greenwell, 92 Mo. l. c. 125; Woods v. Johnson, *supra*; Hatton v. St. Louis, *supra*.] Any change in this well settled rule would, *if carried to its last analysis*, work havoc in many fields of the law. It would render us wholly unable to interfere in any case with the verdict of a jury or to pass as a matter of law upon the point of lack of evidence in any case whatever. It would be to abdicate the powers conferred on us by the Constitution and the statute and leave both trial courts and juries untrammeled by any overseeing control.

It follows, we think, that from the adjudged cases, we may fairly deduce the below conclusions: (a) The findings of fact, either general or special of the trial court sitting in a jury-waived case at law, will have applied to them in an appellate court the same presumptions of verity which attach to the verdict of a jury in a law case (Woods v. Johnson, *supra*); (b) such findings of fact may be examined by an appellate court if the point that there was insufficient evidence be properly preserved in the motion for a new trial alone (Blakely v. Railroad, 79 Mo. 388; Carver v. Thornhill, 53 Mo. 283); (c) in such cases an examination as to the sufficiency of the evidence may be had here, whether there were instructions asked, given or refused; but (d) such examination by us will extend only to a determination of the single question whether there is any substantial evidence to sustain the finding of the court. If there is such substantial evidence, and if such substantial evidence be merely contradictory, or, if the evidence adduced be such that reasonable men may draw therefrom more than one inference or inferences to sustain the judgment (Finnegan v. Railroad, 244 Mo. l. c. 653; Linderman v. Carmin, 255 Mo. l. c. 66), or (stated another way), if the evidence offered reasonably tends to sustain the finding

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made (*Hatton v. St. Louis, supra*), such finding is absolutely conclusive upon us, and we cannot interfere.

Measured by the above rules, we think the prima-facie case made out by the plaintiff herein was not contradicted by any substantial evidence whatever. It results that the case must be reversed and remanded for a new trial, if the parties are so advised; upon which, should the proof on defendants' part be not materially strengthened, the judgment should be for plaintiff. It is so ordered. All concur.

EDWARD J. LAMPERT and COMMERCE TRUST COMPANY v. GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD., Appellant.

Division Two, July 27, 1917.

1. **ACCIDENT INSURANCE: Accidental or Intentional Injury.** Evidence tending to show that plaintiff fell from the step of a street car, his shoulders striking the ground first; that immediately after the accident a bruised place was discovered on the rear portion of the top of his head and he was lying on his back, his left hand crushed; that the unconsciousness was caused by concussion of the brain resulting from the injury to his head, and could not have been produced by the injury to his hand; and that he became unconscious before his hand was crushed, is evidence that the injury was accidental, and that he did not intentionally thrust his hand under the car wheel, and made a case for the jury.
2. **—: Warranties: That Beneficiary Was Wife.** In a suit on an accident policy by the insured for injuries to himself, a warranty in the policy that a certain named woman was his wife is not material, and if untrue is not a defense. The purpose of naming a beneficiary is to designate a person who will receive the insurance money only in event of insured's death.
3. **—: Policies of Life Insurance: Materiality: Questions for Jury.** An accident policy, at least those portions of it providing indemnity for loss of life, is a policy of life insurance, within the meaning of the suicide statute (Sec. 6937, R. S. 1909), and that statute provides that no misrepresentation made in obtaining a policy of insurance on the life of any person shall be deemed material

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unless the matter misrepresented actually contributed to the contingency or event on which the policy is to become void, and whether it so contributed in any case shall be a question for the jury. Even though the representation or warranty as to the beneficiary in case of the insured's death is false, the court cannot peremptorily instruct to find for the company, for the jury still have the right to say whether such misrepresentation actually contributed to the loss.

4. _____: **Warranties: Insured's Habits of Life: Income: Other Insurance.** Even though the insured warranted that his habits of life were correct, that his income per week exceeded the gross amount of weekly indemnity promised in all accident policies carried by him, and that he had no other accident insurance, if the evidence upon the issue of the falsity of these warranties is conflicting, the matter is for the jury, and the court cannot peremptorily instruct them to find for defendant.
5. **INSTRUCTIONS: Assuming Disputed Facts: Comment on Evidence.** Instructions which assume as true facts in dispute, or contain unwarranted comments on the evidence, should be refused.
6. _____: **Plaintiff's Failure to Testify.** An instruction telling the jury that plaintiff was present in court and heard the testimony of witness relating his conduct and movements about the time he received the injury complained of, and that from his failure to take the stand in his own behalf a strong presumption of law arises that his testimony, if given, would not sustain the issues on his part, if ever proper, is not proper in a case where defendant took plaintiff's deposition, which covered every point that might possibly relate to the issues, and read it to the jury.
7. **EVIDENCE: Moral Character of Insured: Charges in Another Court.** A charge contained in the answer of plaintiff's wife filed in a divorce proceeding wherein plaintiff was charged with sexual perversion, is not evidence of such fact. Nor is the mere fact that plaintiff stood charged at the time of his suit on the accident policy with a criminal charge in another court, any evidence that he is guilty of the charge.
8. _____: **Exhibition of Injured Arm in Court.** The exhibition in open court by plaintiff of his injured arm, which is the subject of his suit on an accident policy, at the request of his attorney, to a physician who at the time was testifying, to which an objection was sustained, after which no request was made that the jury be discharged or that counsel be admonished for his conduct, is no ground for reversal.
9. **JUROR: Voir Dire Examination.** If the record leaves in doubt what questions were asked and what actually occurred upon the *voir dire* examination of the juror, his alleged false answers cannot be reviewed on appeal.

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10. **SUPPLEMENTAL MOTION FOR NEW TRIAL:** Untimely. Matters attempted to be preserved by a supplemental motion for a new trial filed out of time cannot be considered.

Appeal from Jackson Circuit Court.—*Hon. O. A. Lucas,*
Judge.

AFFIRMED.

J. C. Rosenberger and Rollin E. Talbert for appellant.

(1) The court erred in refusing to give the peremptory instruction asked by defendant at the close of the whole case. There was no evidence that the injury was accidental and all the evidence showed that it was intentionally self-inflicted. (a) Lamport's failure to testify as a witness in his own behalf, though present in court, or to explain or deny the overwhelming proof against him is a confession of guilt. 1 Starkey on Evidence, p. 54; Moore on Facts, pp. 571, 574, 575; McClanahan v. Railroad, 147 Mo. App. 386; Cass County v. Green, 66 Mo. 512; Mockowick v. Railroad, 196 Mo. 571; Dickinson v. Bentley, 80 Ala. 482; Bryant v. Tink, 75 Iowa, 516; Keller v. Gill, 92 Md. 190; Societe, etc. v. Allen, 90 Fed. 815. (b) A party who hears witnesses give evidence against him and who does not take the witness stand to deny or explain the testimony of such witnesses, such testimony is to be taken as true "as much so as if the party had made the admission in express terms." Payne v. Railroad, 136 Mo. 594; State v. Musick, 101 Mo. 271; State v. Patrick, 107 Mo. 174; State v. Alexander, 147 Mo. 386. (c) Lamport being alive, in court and able to testify and he having wilfully failed to testify, he is not entitled to any presumption of innocence or of self-preservation or of due care. Mockowick v. Railroad, 196 Mo. 571. (d) In cases of this kind it is competent and relevant for defendant to prove the man's conduct, financial straits, secret frauds and crimes, situation in life, domestic and family complications, entanglements with women, sexual perversion and general depravity not only at

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the time of the act in question but before and after the act, all as bearing upon the surrounding circumstances, his mental state, motive and intent at and before the time of the act under investigation. The issue involving an act of great moral turpitude, not committed by ordinary men, the widest latitude was to be allowed the defendant in showing these matters. *Ex parte Alexander*, 163 Mo. App. 615; *Long v. Ins. Co.*, 113 Iowa, 259; *Kerr v. M. W. A.*, 117 Fed. 593; *Agnew v. Ins. Co.*, 95 Wis. 445; *Shoe Co. v. Ins. Co.*, 8 Tex. Civ. App. 227; *Smith v. Ins. Co.*, 123 N. Y. 85; *Joy v. Ins. Co.*, 32 Tex. Civ. App. 443. (e) The direct evidence of numerous eye witnesses who saw the occurrence and saw Lampert deliberately put his hand on the track stands wholly undenied. (f) The circumstantial evidence establishing Lampert's motive, intent, history and situation in life, and his incriminating conduct at and before the occurrence, stands wholly undenied. *Long v. Ins. Co.*, 113 Iowa, 259; *Ex parte Alexander*, 163 Mo. App. 615; *Kerr v. M. W. A.*, 117 Fed. 593; *Agnew v. Ins. Co.*, 95 Wis. 445; *Shoe Co. v. Ins. Co.*, 8 Tex. Civ. App. 227; *Smith v. Ins. Society*, 123 N. Y. 85; *Joy v. Ins. Co.*, 32 Tex. Civ. App. 443. (g) The physical facts, to-wit, the slow movement of the street car, the man's conceded position just after the injury, and all of the physical surrounding circumstances show that it was impossible for him to have injured himself except on purpose. *Daniels v. Elev. Ry. Co.*, 177 Mo. App. 280; *Scroggins v. Met. St. Ry. Co.*, 138 Mo. App. 215. (h) Appellate courts will not hesitate to set aside the verdict of a jury which is clearly against the evidence or not based on sufficient evidence. *Champagne v. Hamey*, 189 Mo. 709; *McClanahan v. Railroad*, 147 Mo. App. 386; *Spiro v. Transit Co.*, 102 Mo. App. 250; *Spohn v. Railroad*, 87 Mo. 74; *Lehinck v. R. R.*, 118 Mo. App. 611; *Demaet v. Storage Co.*, 121 Mo. App. 92. (i) And this is especially true when the prevailing party has failed to produce his own or other evidence under his control or has stifled evidence. *McClanahan v. Railroad*, 147 Mo. App. 410; *Fisher v. Ins. Co.*, 124 Tenn. 462; *Payne v. Railroad*, 136 Mo. 594. (2) The court

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erred in overruling defendant's demurrer to the evidence for the further reason that on the undisputed evidence Lamport obtained the policy by making false warranties in the policy touching (a) his habits of life; (b) his relationship to the beneficiary whom he represented as his wife but who was in fact his mistress; (c) his income; and (d) his other accident insurance which was falsely stated. These warranties having been false were breached and rendered the policy void. (a) Lamport's statements in the schedule of warranties that he was a married man, and that the beneficiary, "Mamie Lamport," was his wife and touching his habits, income, etc., were warranties, were material to the risk and, being false, rendered the policy absolutely void. *Ashford v. Insurance Co.*, 80 Mo. App. 638; *Van Cleave v. Insurance Co.*, 82 Mo. App. 668; *Aloe v. Mutual Reserve*, 147 Mo. 573; *Pacific Mutual L. Ins. Co. v. Glaser*, 245 Mo. 377; *Claver v. Mod. Woodmen*, 152 Mo. App. 164; *Gaines v. Insurance Co.*, 188 N. Y. 411; *Gaines v. Insurance Co.*, 93 App. Div. (N. Y.) 524; *Jeffries v. Insurance Co.*, 22 Wall. (U. S.) 47; *Makel v. Insurance Co.*, 95 App. Div. (N. Y.) 261; *Insurance Co. v. Lindsay*, 111 Va. 389; *Insurance Co. v. White*, 100 Pa. St. 12; (b) Where, as here, the policy recites that it is issued in consideration of the statements made in the schedule of warranties, attached thereto and made part thereof, "which the insured makes and warrants to be true on the acceptance of the policy," and the insured does accept the policy containing said warranties, he will not be heard to say that the contents of said schedule were not warranties and any untrue statement therein will avoid the policy. *Wollman v. Casualty Co.*, 87 Mo. App. 766; *Bonewell v. Acc. Co.*, 160 Mich. 137; *Gaines v. Fid. & Cas. Co.*, 188 N. Y. 411; *Ins. Co. v. Crabtree*, 146 Ky. 371; *French v. Fid. & Cas. Co.*, 135 Wis. 259; *Kirkpatrick v. Guarantee & Acc. Co.*, 139 La. 370. (c) Sec. 6937, R. S. 1909, which provides that breach of warranty shall be no defense to a suit on a policy of insurance "on life" unless the matter represented "contributed" to the loss insured against, has no application to this case because this is not a

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suit to recover life insurance but is upon an accident policy to recover for a non-fatal injury upon one of numerous severable and independent covenants to pay indemnity for various specified losses, wholly distinct from the promise to pay for loss of life, so that this is not a suit on policy of insurance "on life." *Logan v. Casualty Co.*, 146 Mo. 116; *Crossan v. Ins. Co.*, 133 Mo. App. 540; *Trabue v. Ins. Co.*, 121 Mo. 75; *Kountz v. Ins. Co.*, 42 Mo. 126; *Loehner v. Ins. Co.*, 17 Mo. 247; *Stephen v. Ins. Co.*, 61 Mo. App. 194; *Jenkins v. Ins. Co.*, 58 Mo. App. 210. (d) The aim and object of the "misrepresentation" statute (Sec. 6937) was to protect the beneficiary, after the lips of the insured had been sealed by death, and was not enacted for the benefit of the insured himself, suing on an accident policy during his lifetime. *Scheurman v. Ins. Co.*, 165 Mo. 649; *Glaser v. Ins. Co.*, 245 Mo. 386. (e) The statute (Sec. 6937) being in derogation of the right of private contract should not be construed to include more than its plain language imports. *Glaser v. Pacific Mutual*, 245 Mo. 386; *Whalen v. Casualty Co.*, 87 Maine, 543; *Casualty Co. v. Dorough*, 107 Fed. 393; *Ticktin v. Ins. Co.*, 87 Fed. 543; *Ins. Co. v. Carroll*, 86 Fed. 567; *National Acc. Co. v. Dolph*, 94 Fed. 743; 36 Cyc. 1168. (3) The court erred in refusing to give instruction 21 requested by defendant which would have informed the jury of the presumption raised against Lamport through his failure to take the witness stand. *Fisher v. Travelers Ins. Co.*, 124 Tenn. 462; *McClanahan v. Railroad*, 147 Mo. App. 386; *Payne v. Railroad*, 136 Mo. 594; *State v. Alexander*, 119 Mo. 461.

Martin J. O'Donnell, Robinson & Goodrich and B. C. Howard for respondents.

(1) Under the evidence the court properly submitted the case to the jury and properly approved their verdict since the evidence showing that Lamport was accidentally injured was not only substantial but conclusive; the function of this court is to affirm the judgment. *State ex rel. v. Ellison*, 256 Mo. 644; *State v. Taylor*, 261

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Mo. 229; Gannon v. Gas Light Co., 145 Mo. 502; Linder-
man v. Carmin, 255 Mo. 66; Ry. Co. v. Wright, 11 App.
Cas. 152; Gilkey v. Sovereign Camp, 178 S. W. 789. (2)
Appellant's contention that the alleged failure of Lam-
port to climb on the witness stand and reiterate the tes-
timony given in his deposition and read to the jury by ap-
pellant gives this court jurisdiction to hold that the jury
violated their oaths in finding for respondents finds no
warrant in the law or in the statute making parties com-
petent witnesses. Sec. 6354, R. S. 1909 Kerstner v.
Vorweg, 130 Mo. 200. The taking of Lamport's deposi-
tion and reading same to the jury at the trial made him
defendant's witness for all purposes and it could not
thereafter impeach him. Black v. Epstein, 221 Mo. 286;
Ex parte Welborn, 237 Mo. 306; Johnson v. Magruder,
15 Mo. 365; Fagate v. Carter, 6 Mo. 272. The deposi-
tion of Lamport was evidence which the jury had a right
to believe or not as they pleased, even if it be regarded
merely as an admission. State v. Carlisle, 57 Mo. 106;
Greenleaf on Evidence, sec. 201; People v. Loomis, 178
N. Y. 405; State v. Mekel, 189 Mo. 322; State v. Simon-
son, 172 S. W. 602. (4) There were no warranties set
out in the schedule. Nor were warranty breaches shown.
(a) The statements in the schedule of warranties are
merely questions which are partly answered or omitted
to be answered. Hence they are not warranties. Ever-
son v. Assurance Corp., 202 Mass. 177; McKennon v. Ins.
Co., 72 N. J. L. 29; French v. Casualty Co., 115 N. W.
869; Maloney v. Casualty Co., 167 S. W. 845; Dilleber v.
Ins. Co., 69 N. Y. 256; Association v. Smith, 86 Ill. App.
427. (b) The statement concerning beneficiary was not
a warranty because it went to the description or identity
of the beneficiary and not to the validity of the policy.
Ins. Co. v. Floyd, 94 Atl. 515; Vivian v. Knights, 20
Atl. 36; Ins. Co. v. Martin, 133 Ind. 381; Van Cleave v.
Co., 82 Mo. App. 668; James v. Council, 130 Fed. 1014;
Goff v. Lodge, 90 Neb. 578; Ins. Co. v. Link, 230 Ill. 273.
(c) The statement in *italics* concerning other insurance
was merely a partial answer, true as far as it went, and
not an affirmation of something not true and, further-

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more, Lampert had no insurance other than that mentioned in the statement. *Emerson v. Accident Co.*, 202 Mass. 177; *Dilleber v. Ins. Co.*, 69 N. Y. 256. (d) Sec. 6937, R. S. 1909, makes warranties in a policy such as that involved herein immaterial unless it is alleged and proved that the warranty breaches contributed to the accident (not to intent as here alleged), which otherwise would operate to make the policy due and payable. Sec. 6937, R. S. 1909; *Hill v. Acc. Assn.*, 189 S. W. 587; *Logan v. Casualty Co.*, 146 Mo. 114. (e) The policy is to be interpreted as though the statute were written into it. *Christian v. Ins. Co.*, 143 Mo. 465; *Logan v. Casualty Co.*, 146 Mo. 114; *Nooms v. Casualty Co.*, 172 Mo. App. 241; *Applegate v. Ins. Co.*, 153 Mo. App. 63; *Moore v. Ins. Co.*, 112 Mo. App. 702. The policy was issued after the Missouri statute had been judicially interpreted to apply to a similar policy and defendant should be held to have adopted that construction as part of its contract. *Lowenstein v. Co.*, 88 Fed. 474, 97 Fed. 17; *Conssback v. Co.*, 116 Wis. 382. (f) A policy insuring against loss of a hand is a policy of insurance on life within the meaning of the statute. *Cook on Life and Accident Ins.*, secs. 1, 2, 105, 106; *Richards on Ins.*, sec. 14.

WILLIAMS, J.—This is a suit upon a policy of accident insurance to recover the sum of ten thousand dollars for the loss of the left hand above the wrist. The policy provided an indemnity of \$10,000 for loss of life and, among other things, provided for paying a like amount for loss of one hand by severance at or above the wrist if the injury be sustained "while a passenger in or on any regular passenger conveyance provided by a common carrier (including the platform, steps or running board of railway or street railway cars.)" The policy was dated August 1, 1911, and was for a period of three months from its date. In the schedule of warranties contained in the policy it is stated that the beneficiary named in the policy, Mamie Lampert, is the wife of the insured; that the insured had no other accident or health insurance except a five-thousand-dollar policy.

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in the same company; that his income per week exceeded the gross amount of weekly indemnity under all policies carried by him, and that his habits of life were correct and temperate.

Trial was had before the circuit court of Jackson County, resulting in a verdict and judgment for the plaintiff. Thereupon the defendant duly perfected an appeal.

The accident occurred about ten o'clock p. m., August 10, 1911, at the street-car stop at the entrance to Fairmount Park, near Kansas City, Missouri. A considerable crowd of people who had been patronizing the park were waiting for a street car. Plaintiff was in this crowd. The number in the crowd was estimated, by the different witnesses, at from twenty to two or three hundred people. As the street car was about to stop for the purpose of receiving passengers from this crowd, plaintiff jumped on to the front step thereof and took hold of the hand-hold. The car then moved about twenty feet farther, with him in this position, when he fell from the step; and while the car was moving slowly it ran over his left hand necessitating the amputation thereof.

Witnesses produced by plaintiff narrated the occurrence as follows:

Louise Ruyssers testified that she and her three sisters were in the crowd waiting for the car and that they were standing near the track as the front end of the car passed them and that something "gave her sister such a knock that she was forced to step back in order to gain her balance." The witness then heard someone scream that a man was hurt. She then turned and saw the plaintiff on the ground, on his back, lying parallel with the car, with his head toward the front end of the car. The plaintiff was groaning.

Sophie Ruyssers corroborated the above testimony of her sister and said that it must have been the man on the car that brushed against her sister. They next noticed the man lying on the ground with his hand crushed.

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Matilda Ruyssers corroborated the testimony of her sisters and said that someone on the front end of the car brushed by her and that she had to step back to gain her balance; that she was not hurt, but that her balance was disturbed and that she fell back against her sister.

Dr. Richard Callaghan, the local surgeon for one of the railroad lines entering Kansas City, testified that he saw the plaintiff get on the front end of the car, about eight feet ahead of where the witness was standing. The witness had himself intended to get on the step, but the plaintiff got on ahead of him, and the witness then turned his attention to the rear end of the car. The witness was not looking at plaintiff when the accident occurred, but immediately went to plaintiff's assistance and found him lying unconscious on the ground with his left hand crushed. The witness also found a bruised place on the rear portion of the top of plaintiff's head. This witness testified that passengers were let in at both ends of the car, on that night, at that place. That when the accident occurred the car was moving slowly, preparing to stop. The witness further testified that plaintiff was suffering from concussion of the brain and that the concussion of the brain rendered plaintiff unconscious; that, plaintiff "came to" in about thirty minutes, but did not become rational and fully regain consciousness until the next morning; that the injury to the hand could not have caused the unconsciousness, but that it could have been caused from the bruise on the head. This witness accompanied plaintiff to the hospital and there aided in amputating the hand. The plaintiff did not sufficiently regain his consciousness to be able to help determine about the amputation of his hand, but the physician in charge decided that it was the necessary thing to do, and it was accordingly done.

Oscar H. Stevens testified that it was crowded around the car; that there was a "bunch" on the front end; that plaintiff was knocked or brushed off and fell and was in under the car "and it looked like he was going to get his head and everything cut off," and the witness grabbed plaintiff by his feet and pulled him out

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from under the car. The witness testified that several people were trying to get on the front end of the car, including himself. The witness said: "I couldn't say about seeing the man fall—such a mob there and crowd, and they was all grabbing, I couldn't—some kind of an object or something, you know, and I went to grab on; I saw him underneath, then I pulled him out. I saw something like it fell off or jumped off; I didn't pay any attention; didn't think anybody was going to get hurt; I saw an object kind of fall down; I saw a car there and they was all scrambling; that made him knock him off or get off, I guess, I suppose. When I took hold of him he was lying on his back." After the accident the witness helped carry plaintiff on to the car.

Sam Tralin testified: "There was quite a mob of people down there waiting for the car. Well, the car came around, kind of swept away around the curve, and I could see—well, just when it was probably about ten feet away from me, I could see a man holding on to the vestibule, to the rods of the car—of course, I couldn't see whether he was standing on the steps or not, because I didn't see below, I just looked on top of the car, I could see that, I could see him fall loose from there. . . . Then Mr. Stevens started to holler, 'That man,' he says, 'just fell off of the car and got cut up,' and then Mr. Stevens ran up to pull him out. There was such a mob right around there I couldn't see what he done with him at all."

Witnesses for the defendant narrated the occurrence as follows:

Bessie Rosenthal testified: "I saw the man as the car was turning the loop; I saw a man hop on the car, and he held there, and when it turned the loop and got towards me, he went and let go, and he fell off, fell kind of on his side, on his back, and then he rolled over, and threw one hand on the track, and hit my slipper with the other hand. He fell on his back." This witness further testified that plaintiff was not unconscious before his hand was crushed, but became so afterwards. She gave as a reason for this conclusion that his eyes were open

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before the injury, but were closed afterwards. She further testified that it was the rear wheel of the front truck that ran over his hand.

Mrs. H. Ankerson testified as follows: "This man jumped or caught hold of that bar of the car—that handlebar there—and it drug him along; he seemed to slip—I don't know whether he slipped or not, I can't say that, but it drug him along and just as he got in front of us he fell, and he fell over and he rolled back again, and just then, why, he threw out his hands, and I says, 'Don't throw your hand under the car'; he threw it right under the car then."

Louis Minturn testified that he saw the man jump for the steps as the car came along and saw him take hold of the handholds; then he saw the plaintiff squat down and let go of the handhold and fall forward on his back. The witness then saw plaintiff roll over and place his hand on the rail under the front trucks and then roll back on his back; that the car ran five or ten feet and then stopped.

Charles Guth, companion of the witness Minturn, testified as follows: "I noticed a man jump on the front step and grab the one handhold, and he let loose—well, he was on there just long enough to let loose, and fell off kind of back down on his back, and forward, and he rolled over and placed his hand under the wheel of the car just about the time the car was ready to stop." This witness saw the wheel run over plaintiff's hand and stated that after this occurred plaintiff "rolled over and threw his left hand in the air, the mangled hand; threw it in the air, on his back. The car was traveling about three or four miles an hour." On cross-examination the witness testified that plaintiff's shoulders hit the ground first; that the plaintiff "kind of squatted and fell back on his shoulders" and that the injured man was unconscious after the accident.

The testimony on behalf of defendant took a wide range and much immaterial testimony was introduced without any objection on the part of plaintiff. The plaintiff did not take the witness stand in person, but the

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defendant offered the deposition of the plaintiff in evidence. In his deposition the plaintiff testified that along in April, 1911, he was solicited by defendant's agent to take out some accident insurance; that he had known the agent since they were boys together in high school, at Kansas City, and that he took out a policy for \$5000; that the agent wanted him to take out a policy for \$15,000; that the first policy was to expire on August 1st and that on July 30th the insurance agent called on him again, told him that he was in a contest for an insurance prize and urged him to take out the additional ten-thousand-dollars insurance. The witness then took out the additional insurance and paid \$15, three months' premium thereon in advance, and at the same time paid three months' back premium on the \$5000 policy, and three months' advance premium on the same policy, and the agent took up the old policy to send in to the company so that a new-form policy could be issued. Afterwards, and on the same day that he took out this additional insurance, a soliciting agent of the Aetna Life Insurance Company, who had been supplying him with employer's liability insurance, called to see him and the subject of accident insurance was mentioned. The Aetna agent asked him about the policy that he was carrying, and the premium he had to pay, and told plaintiff that defendant company was charging him \$10 more a year than the Aetna Company would charge him to carry the \$10,000 insurance and told the plaintiff that if he would come to the Aetna office he could prove it to him. The next day the plaintiff went to the Aetna office and, after some discussion, agreed to take a ten-thousand-dollar accident policy in the Aetna Company. The premium on the Aetna policy was \$10 a year less than the premium charged by the defendant company. Plaintiff told the Aetna agent that he had \$15,000 in the defendant company and that he would cancel the ten-thousand-dollar policy held by the defendant company. On August 8th, plaintiff called the defendant's agent over the 'phone and told him to cancel the ten-thousand-dollar policy, but the agent said that he had already sent the applica-

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tion to the company and told the plaintiff that it would cancel itself in three months. The agent, after the telephone talk, came down to the plaintiff's office and, after discussing the matter, the agent became angry and left the office and the plaintiff was also angry. Plaintiff did not tell the defendant's agent that he had, in the meantime, procured a ten-thousand-dollar policy in the Aetna Company, giving as a reason that he did not want his old schoolmate friend to feel sore. On the morning of the accident plaintiff says that he intended to go to Topeka and was down at the Union Depot and bought a ticket for Topeka, which he intended to use on the train leaving Kansas City at 4:30 p. m. About four o'clock that afternoon he started to go to the Union Depot and stopped at the Santa Fe up-town ticket office and there purchased an accident policy in the Traveler's Insurance Company, good for two days. The policy was for \$2500 for loss of life and \$1250 for the injury which plaintiff later suffered. Plaintiff testified that he had always been in the habit of buying accident tickets when he had to travel and that when he bought this ticket he had forgotten about having taken out the other accident policies. After the plaintiff bought the accident ticket at the Santa Fe office, he was informed by the agent that it was too late for him to catch the train for Topeka and he didn't go to Topeka that day. Later in the evening, he decided to go to Sheffield to investigate some proposed contracts for roofing, which he desired to obtain. Plaintiff was the president of the Lamport Roofing Company. After he got on the car going to Sheffield he became interested in looking over some proposed contracts that he had and the street car passed Sheffield without his knowledge. He then rode on out to Fairmount Park where he spent a portion of the evening, and started to return home about ten p. m.; that there was a crowd waiting for the car and just before the car reached him a man standing to the left of plaintiff stepped on the front step of the car and, as the car passed, plaintiff stepped up beside the man on the step. He further testified: "I was standing right up there, and I felt—could feel the people—they was so thick

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there—crowding against me there, and I rode—I don't have any idea how far—it seems to me that I rode twenty feet, possibly not that far, when I was grabbed in there, right here in the side there. I was either grabbed or hit or something that took the wind out of me. I couldn't move. It just seemed to kill my feelings, and the next thing I felt or know of I felt a standing on my head. That's the way it seemed to me. I had a feeling of standing on my head. That's all I remember of, but when I got hit there it just seemed that I couldn't move a muscle. I couldn't do a thing. I just seemed to get that way. It seemed to stun me, but still I felt standing on my head, and that's all I could remember of doing."

The plaintiff did not regain consciousness until the next morning and stated that he had no idea as to how he lost his hand and that his hand was amputated before he recovered consciousness.

The plaintiff further testified that creditors were not pressing him for money at the time he was injured and that his business was prosperous; that the assets of the Lampert Roofing Company were about nine thousand dollars and that the firm owed a bank about one thousand dollars at that time.

At that time plaintiff owed a Mr. LaForce about one thousand dollars as balance on a rooming house which he had purchased and owed about forty dollars on a grocery bill; that he owned nine thousand dollars of the \$15,000 capital stock of the roofing company and that he had two or three hundred dollars on deposit at the Trust Company at the time he was hurt.

He testified that he had collected the \$1250 on the policy he purchased at the Santa Fe Ticket office.

It further appears from the evidence that after this accident, and on February 13, 1912, plaintiff deposited the policy here in suit with the Commerce Trust Company of Kansas City to secure an indebtedness of \$9000 which he then owed the bank and which he had borrowed since the accident. It appears from the evidence that the trust company was made party plaintiff to this ac-

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tion, after the suit was pending, and after the above mentioned placing of the policies as collateral security.

There was evidence tending to show that, at the time of this accident, plaintiff was the owner of a rooming house called the New Era; that he did not conduct it personally, but employed different women to manage the same. Some of the witnesses testified that the house was conducted along moral lines, but others said it was not. One witness said that street walkers were permitted to enter therein, with the knowledge and acquiescence of plaintiff. There was also evidence tending to show that no profits were being realized by plaintiff from this rooming house at the time of the accident. Plaintiff originally gave \$1500 for the same, and was carrying about \$3150 insurance on the furniture therein.

The agent of the defendant company corroborated in a way the testimony of plaintiff about the purchase of the accident insurance policies; but stated that plaintiff brought the subject up, on July 30, 1911, and that he seized the opportunity and persuaded the plaintiff to take the additional policy for ten thousand dollars and that he delivered the policy to plaintiff on August 7th, and plaintiff asked the witness if he had to keep the policy and that the agent told plaintiff that he had his money and that plaintiff had to keep the policy. This witness further testified that plaintiff never asked him to cancel the policy.

The agent for the Aetna Company testified that the plaintiff came to him inquiring about insurance and that he did not go to plaintiff and solicit the business by knocking on defendant company. He did admit, however, that he explained the advantages of the Aetna policy over the policy of the defendant company, and that plaintiff told him about his having fifteen thousand dollars of insurance in the defendant company, and said that he would refuse to take the ten-thousand-dollar policy in the defendant company when it was delivered.

The general agent of the defendant company in Kansas City testified that a few days before the accident plaintiff called at the office and asked him to explain the

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double indemnity clause, which he did, telling plaintiff that if he received injuries while on the steps or any part of a car he would receive double indemnity.

A signed statement of the Lampert Roofing Company, dated June 13, 1911, and supplied by plaintiff to the Trust Company, for the purpose of securing credit for the company, showed total liabilities \$2535 and total assets, \$10,900.

There was also evidence tending to show that plaintiff drew fifteen dollars a week from the roofing company. This amount was drawn by each of the three general stockholders, but it appears that when any one of the three wanted more money that he drew it from the company and each of the others would draw a like amount. The evidence further tended to show that any additional profits made by the company were left in the treasury of the company and put into the company's business.

A short time prior to the accident the people near the factory of the Lampert Roofing Company complained of the smoke and fumes coming therefrom and had threatened to have the same abated as a nuisance, and it appears that after the accident, and on August 30, 1911, the plaintiff was fined fifty dollars in police court because of the smoke nuisance, and the plant was closed. Afterwards plaintiff made arrangements to move the plant to Kansas City, Kansas, and executed a contract to purchase a piece of land over there for about \$6,000 and paid five hundred dollar down on same, but had never paid any further sums up until the time of the trial. Plaintiff moved his plant over to Kansas City, Kansas, and bought considerable new machinery, but it appears that at the time of the trial the plant was not being operated.

The evidence also shows that a few years before this accident plaintiff spent sometime in South Africa, trading with the natives, and that he had lived in several different places, but finally came back to Kansas City; that he had a wife living at Chicago at the time of the

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accident, but that he was living with another woman in Kansas City.

The evidence further tended to show that prior to the accident the gross business of the roofing company amounted to \$600 or \$800 per month, but the amount of profits is not shown.

In rebuttal the book-keeper for the Lampert Roofing Company testified that she heard plaintiff tell the agent of the defendant company that he wanted to cancel the ten-thousand-dollar policy, but that the agent refused to cancel it; this occurred in the office of the roofing company, prior to the accident.

Such further facts as may be necessary to an understanding of the issues will be stated in the opinion.

I. Appellant contends that the court erred in overruling its demurrer to the evidence offered at the close of the evidence.

In this behalf it is insisted that there was no evidence that the injury was accidental. We are unable to agree with this contention. There is evidence tending

Accidental or Intentional Injury. to show that plaintiff fell from the step of the street car, his shoulders striking the ground first. Immediately after the accident a bruised place was discovered on the rear portion

of the top of his head and plaintiff was lying on his back unconscious—his left hand crushed. Dr. Callaghan, who was present at the scene of the accident, went to the immediate relief of the plaintiff and accompanied him to the hospital. He testified that plaintiff was unconscious and that he did not become rational until the next morning; that he was suffering from concussion of the brain; that the injury to the hand *could not* have caused the unconscious state, but that the bruise on the head could have caused it. Plaintiff, in his deposition, introduced in evidence by the defendant, testified that he became unconscious before his hand was injured. We are, therefore, of the opinion that there was sufficient evidence to justify the jury in finding that plaintiff was unconscious before his hand was crushed. If that were

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true he could not have *intentionally* thrust his hand under the wheel as contended by defendant. Upon a demurrer to the evidence, plaintiff is entitled to every favorable, reasonable theory or inference arising from the whole evidence. We are, therefore, of the opinion that a case was made for the jury on the issue of accidental injury.

II. It is further contended that the court erred in refusing to peremptorily instruct the jury to return a verdict in favor of defendant, as requested in its refused ~~Warranties~~ instructions numbered 13, 14, 15 and 16, because of the alleged false warranties made by Lampert in obtaining the insurance. We are unable to agree with this contention. Said instructions were as follows:

"13. In the policy sued on, the plaintiff Lampert warranted that one Mamie Lampert was his wife. The evidence shows that this warranty was untrue; that Mamie Lampert never was the wife of plaintiff Lampert. Your verdict will therefore be in favor of the defendant.

"14. In the policy sued on, the plaintiff Lampert warranted that his habits of life were correct. The evidence conclusively shows that this warranty was false, and your verdict will be in favor of the defendant.

"15. In the policy sued on, the plaintiff Lampert warranted that his income per week exceeded the gross amount of weekly indemnity under all policies carried by him. This warranty was false, and your verdict will be in favor of the defendant.

"16. In the policy sued on, the plaintiff Lampert warranted that he had no accident insurance issued by stock companies, except a certain policy issued by the defendant. This warranty was false and untrue, and your verdict will be in favor of the defendant."

Instruction 13 above is based upon the alleged warranty in the policy that the beneficiary named therein was the wife of the insured. The evidence, we think, unmistakably shows that the beneficiary was not the wife of the insured. However, since the very purpose of

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naming a beneficiary is to designate a person who will receive the loss payment only *in the event of the death* of the insured, it is difficult to see what possible materiality that warranty could have on the validity of that portion of the policy which provides only for paying certain losses, for injuries not resulting in death, direct to the insured.

It has been held that a policy of this character, at least with reference to those portions providing indemnity for loss of life, were policies of life insurance, within the meaning of the suicide statute of this State. [Logan v. Fidelity & Casualty Co., 146 Mo. 114.]

By like reasoning such a policy or at least so much thereof as relates to indemnity for loss of life, would likewise be a "policy of insurance on life" within the scope of section 6937, Revised Statutes 1909, which provides that:

"No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons, citizens of this State, shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case shall be a question for the jury."

Under the provision of the above section the court would not be justified in giving the peremptory instruction to find for the defendant even though the representation or warranty as to the beneficiary were false, this because the jury would still have the right to say whether such misrepresentation actually contributed to the loss.

Concerning instructions 14, 15 and 16 above, it is sufficient to say that the evidence upon the issue of false warranties therein mentioned was conflicting and it cannot be said that either of the other warranties were false as a matter of law. That point alone would justify the court in refusing to give the instructions as asked. And, under such a condition, it becomes unnecessary to a determination of this case to decide whether or not the war-

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ranties or representations mentioned in said instructions fall within the scope of Section 6937, supra.

III. Neither did the court err in refusing defendant's instructions which attempted to submit to the jury the issues arising upon said warranties. The several instructions in this behalf are quite lengthy and it would serve no useful purpose to set forth the same herein. We have carefully examined the same and find that they do not properly instruct the jury upon those issues even if defendant's theory of the law be correct. Furthermore said instructions assume, as true, facts which are in dispute, and contain unwarranted comments on the evidence, either of which, alone, would justify the action of the trial court in refusing the same.

IV. We are unable to agree with appellant's contention that the court erred in refusing to give its instruction number 21.

This instruction, in effect, told the jury that the plaintiff was present in court and heard the testimony of witnesses relating his conduct and movements about the time he received the injury in question, Plaintiff's Failure to Testify. but that he did not take the witness stand in his own behalf and that from such failure a strong presumption of law arises that his testimony, if given, would not sustain the issues upon his part.

Whether such an instruction would ever be proper, we have very serious doubts, but as to that we need not now determine, because such an instruction would certainly be improper in the present suit where plaintiff's testimony, in deposition form, covering about 140 pages of this record, was introduced in evidence by the defendant and considered by the jury. This deposition took a wide range and plaintiff gave testimony, not only upon every point that might possibly relate to the issues, but also upon matters clearly outside the issues. He explained in that deposition that he became unconscious

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before his hand was injured and that he did not know how the injury was caused.

We, therefore, rule that the court did not err in refusing this instruction.

V. It is contended that the court erred in excluding the following evidence:

(1) A portion of the answer of plaintiff's wife filed in a divorce proceeding in Chicago in 1908 wherein she charged plaintiff with sexual perversion.

(2) Letters written by plaintiff to his wife in 1903, 1905 and 1906.

(3) The record of the municipal court of Chicago showing that on April 8, 1908, the plaintiff was found guilty of wife abandonment and, by said court, was ordered to pay to his wife the sum of \$250 and that the plaintiff stand committed until the above sum is so paid. The record further shows that the plaintiff was, by said court, discharged on April 22, 1908.

(4) The records of the district court of Wyandotte County, Kansas, showing that a criminal action was pending therein in which plaintiff stood charged with the crime of perjury in making a false affidavit in connection with a divorce proceeding instituted by plaintiff in said court on the 14th of November, 1912.

The court did not err in excluding any of the above evidence. (1) The mere fact that plaintiff's wife, in her divorce answer, charged him with sexual perversion,

would be no evidence of such fact. Furthermore, ^{Extraneous Matters.} more even though, if upon any theory, it were held to be evidence of the existence of such a fact, we think the matter too remote for the purpose of proving plaintiff's habits of life at the time of the purchasing of this insurance and at the date of the accident.

(2) We have carefully read the letters written by plaintiff to his wife in 1903, 5 and 6. They are quite lengthy. We are unable to find anything therein, the rejection of which would work a reversal of the case. (3) The judgment of the Chicago Municipal Court, in 1908, finding plaintiff guilty of wife abandonment and ordering him to

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pay his wife the sum of \$250 would not tend to prove any issue in the present case. (4) The mere fact that plaintiff stood charged with the crime of perjury would be no evidence that plaintiff was in fact guilty of the charge.

These propositions appear to be so plain as to require no citation of authority.

VI. It is contended that the judgment should be reversed because the plaintiff at the request of his attorney exhibited to Dr. Callaghan, while a witness on the

Exhibition of Injured Arm. stand, in the presence of the jury, the stump of his mutilated arm. It appears to us that this point is frivolous. Furthermore no foundation for error was laid at the trial. The defendant's counsel objected to the exhibit and the trial court sustained the objection.

No request was made by the defendant for a further ruling or action upon the part of the court in connection with the matter. It would appear that defendant did not then regard the occurrence as prejudicial to its rights because no request was made that the jury be discharged or that counsel be admonished for his conduct. The plaintiff had a right to be present at the trial of his case. And his mere presence at the trial would unavoidably exhibit to the jury the mutilated arm. The exhibition by the plaintiff of his arm to the Doctor upon the witness stand would give the jury very little information which they did not already possess, and we do not find that the occurrence would have justified a reversal of the case even though a proper foundation had been laid for preserving the error now urged.

VII. It is contended that the judgment should be reversed because of improper remarks made by plaintiff's attorney in his closing argument to the jury. We

Remarks of Attorney. have carefully examined this assignment of error, but do not find any remarks made by counsel which would warrant a reversal of the judgment.

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VIII. It is further contended that the court should have granted a new trial on account of the alleged misconduct of one of the jurors. In this behalf Juror. it is claimed that on his *voir dire* examination the prospective juror testified that he had never been in a dispute with any insurance company when the exact contrary was true.

The present condition of the bill of exceptions does not justify a discussion of this point. The *voir dire* examination of the witness is not preserved in the bill of exceptions. Upon a hearing had upon the motion for a new trial the evidence is in conflict as to what questions were asked the juror upon his *voir dire* examination. According to the juror's own sworn testimony, he made true answers to questions propounded him upon his examination. The trial court who passed upon this question was present when the *voir dire* examination was had, and ruled against appellant's contention on the point now urged. Since the condition of the present record leaves in doubt just what occurred upon the *voir dire* examination, we are unable to determine whether or not the juror concealed any matter which he should have disclosed.

The point is therefore disallowed.

IX. Other matters urged as ground for reversing the judgment are matters which are attempted to be preserved by the filing of a supplemental motion for a new trial which was filed long after the four day period had expired, and in fact after the judgment term had ended.

Supplemental Motion for New Trial. It is well settled in this State that the appellate review of matters of exception must be confined to the matters properly preserved in a motion for a new trial filed within the four-day period prescribed by statute (Sec. 2025, R. S. 1909) and that matters attempted to be preserved by motion for a new trial or supplemental motion for new trial, filed out of time, will not be considered. [Saxton National Bank v.

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Bennett, 138 Mo. 494, l. c. 500; Mirrieles v. Railroad, 163 Mo. 470; State ex rel. Iba v. Ellison, 256 Mo. 644, l. c. 664, and cases therein cited.]

The judgment is affirmed. All concur.

THE STATE ex rel. J. F. FURBY, Collector, v. CONTINENTAL ZINC COMPANY, Appellant.

Division Two, July 27, 1917.

1. **CITY: Current Expenses: Payment of Debts of Prior Years.** Section 12 of article 10 of the Constitution gives to a city authority to levy the annual maximum rate of taxes for city purposes and to spend it all, as it sees proper, in paying its current expenses of all kinds, and it is beyond the power of the Legislature to divert those current funds to the payment of debts of prior years.
2. **—: —: —: Extra Tax.** When a city contracts a valid debt for any year, then spends for other purposes its current funds for that year, leaving such debt unpaid, it has the power, if authorized by a two-third vote, to levy a tax in excess of the annual rate for city purposes, in order to pay that debt.
3. **—: New Debt.** Where by way of a compromise of a judgment against a city for debts due a water company for hydrant rentals, bonds were voted by the people to pay the amount agreed upon, the debt evidenced by the bonds, if not a new debt, was a very different debt from that evidenced by the judgment.
4. **—: Sufficiency of Tax Bill: Special Tax.** The law does not require that the back tax bill shall state a full and complete cause of action for the tax. It is not necessary to its validity that it show with specific clearness the purposes for which a "special tax" and a "sewer fund tax" were levied. The real matter for consideration is whether the tax imposed under section 12 of article 10 of the Constitution is included in the term "special" tax used in section 11.

Appeal from Jasper Circuit Court.—*Hon. David E. Blair, Judge.*

AFFIRMED.

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Spencer & Grayston for appellant.

(1) The so-called back tax bill was not sufficient as to the heads "Special" and "Sewer Fund," to constitute *prima-facie* evidence. R. S. 1909, sec. 11498. (2) The city of Carterville, having less than 10,000 inhabitants, was confined to a levy of fifty cents on the one hundred dollars for all purposes mentioned as indicated in the so-called back tax bill. Waterworks Co. v. Lamar, 128 Mo. 188; Constitution, art. 10, sec. 11. (3) The only provision for a city of less than 10,000 inhabitants levying a tax rate in excess of fifty cents on one hundred dollars' valuation is where the people vote for a new indebtedness. Waterworks Co. v. Lamar, 128 Mo. 188; Constitution, art. 10, sec. 12; R. S. 1909, secs. 9544-9546. (4) The hydrant rental for which a "special" or additional levy was made should have been paid out of general revenues, that is funds arising out of the fifty-cent levy. Water Works Co. v. Carterville, 142 Mo. 106, 153 Mo. 132. (5) Submitting a bond proposition to the people for their approval, where the bonds are to be used to pay an old debt, does not authorize the city to make a levy in addition to the rate limited by section 11, article 10, Constitution, for the purpose of paying the bonds. Const., art. 10, sec. 12; R. S. 1909, sec. 9357.

Allen McReynolds and Baird & Gass for respondent.

(1) The tax bill was in proper form and sufficient. R. S. 1909, sec. 11498; Stanberry v. Jordan, 145 Mo. 381. It is not necessary to set out detailed information in the tax bill as to each classification. It is sufficient to classify each tax under some appropriate head. State ex rel. v. Burr, 143 Mo. 209. The duly certified tax bill was *prima-facie* evidence that the amount claimed was "just and correct." State ex rel. v. Ross, 93 Mo. 126; State ex rel. v. Maloney, 113 Mo. 370. And when the tax bill is introduced, it then devolves upon the defendant to show any omissions, insufficiencies, or defenses. State ex rel. v. Fullerton, 143 Mo. 686; State ex rel. v. Cun-

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ningham, 153 Mo. 642; State ex rel. v. Vogelsang, 183 Mo. 22. (2) The city had the right with the assent of two-thirds of the legal voters to vote bonds for the purpose of paying the indebtedness represented by a judgment against it. Sec. 9355, R. S. 1909; Sec. 12, art. 10, Constitution. (3) Whenever the city was confronted by a judgment debt it had the right to arrange for the payment of that debt by a bond issue. Sec. 9355, R. S. 1909. Such arrangement was valid so long as the indebtedness did not exceed the five per cent limit and was incurred with the consent of two-thirds of the voters. Sec. 9355, R. S. 1909; Sec. 12, art. 10, Constitution. Whenever two-thirds of the voters consented to a funding of the judgment debt in such a manner, the source of that debt became immaterial. (4) Sec. 9355, R. S. 1909, is constitutional and valid. The interpretation of this section and section 12 of article 10 of the Constitution urged by appellant is not sound and is not supported by decisions. Waterworks Co. v. Lamar, 128 Mo. 188; State ex rel. v. Wabash Ry. Co., 169 Mo. 563; Evans v. McFarland, 186 Mo. 724; State ex rel. v. Thompson, 211 Mo. 64; Trust Co. v. Pagensticker, 221 Mo. 128.

ROY, C.—This is a suit for city taxes on the southeast fourth of the northwest quarter of section 21, township 28, range 32, in Carterville. There was a judgment for plaintiff, and defendant has appealed to this court, constitutional questions being involved.

In 1889 the city of Carterville, then and now a city of the fourth class and having a population over a thousand and less than ten thousand, entered into a contract with one O'Neil, by which it agreed to pay him for hydrant rentals for its supply of water, at the rate of fifty dollars a year for each hydrant. That contract was approved by a two-thirds vote at an election held for that purpose, but there was nothing in those proceedings authorizing the city to become indebted beyond its annual income for any one year or to levy a special tax to pay the hydrant rentals.

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O'Neil assigned his contract and the waterworks to the Webb City & Carterville Waterworks Company, which continued to supply the city with water under the contract.

The hydrant rentals went unpaid as follows:

| | |
|---------------------------------------|------------|
| For last half of the year 1892 | \$1025.00 |
| For 1893 | 2356.75 |
| For first three-fourths of 1894 | 2025.00 |
| | <hr/> |
| | \$5,406.75 |

The waterworks company sued for that amount. The trial court held that the city had no power to become indebted for any year beyond its annual revenues without being so authorized by a two-thirds vote, and that the city had not been so authorized. It further held that the city, after paying the ordinary current expenses of the city government for each of those years, had no funds with which to pay the hydrant rentals. It gave judgment for defendant in that case.

On appeal to this court that judgment was reversed and the cause remanded. See *Waterworks Co. v. Carterville*, 142 Mo. 101, where all the facts including the judgment of the trial court are set out. This court, in effect, held that the city could not by the proceedings above mentioned become indebted in any year beyond its annual revenues. It further held that such annual revenues should have been applied first to the payment of the salaries of the city officers and the expenses of policing the city, and that all the balance of each year's revenues should have been applied in payment of the hydrant rentals for each year respectively.

The trial court, in accordance with that opinion, took an account and rendered judgment in favor of the plaintiff therein for \$4908.06. On appeal that judgment was affirmed. [See 153 Mo. 128.]

Following that judgment, there was a compromise between the parties, the exact terms of which are not shown. In pursuance of that compromise bonds were issued to pay that judgment, the proposition to issue the

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bonds being approved by a two-thirds vote at an election held for that purpose.

The taxes herein sued for are for the years 1905 to 1909 inclusive as follows:

| | |
|---|----------|
| Total for general fund for those years | \$351.00 |
| Total for special fund for those years | 177.00 |
| Total for sewer fund for 1907 to 1909 inclusive | 182.04 |
| <hr/> | |
| | \$710.04 |

as shown by the back tax bill filed with the petition and put in evidence by the plaintiff.

The taxes for the general fund were levied at the full annual rate of fifty cents on the hundred dollars' valuation.

On the trial of this case the plaintiff put in evidence the back tax bill showing the above taxes and rested. The defendant objected to the items of taxes under the heads "special" and "sewer fund." The grounds of the objection to the special taxes and sewer fund taxes was that the back tax bill did not show for what purpose said taxes were being levied and collected.

In connection with the trial the following agreements were made:

"It is agreed that the items in the column headed "Special" were levied to pay interest on and to create a sinking fund to pay the principal of bonds issued for the purpose of paying a judgment in favor of the Webb City and Carterville Water Company based upon a compromise of the indebtedness claimed to be due for hydrant rental at a yearly rate payable quarterly and which was in default before the judgment was obtained, and consequently before the bonds were issued and that the bonds were issued in an amount equal to the judgment and this is to include the item of \$18.50, which plaintiff states was levied for the same purpose for the year 1907.

"By this agreed statement the defendant does not waive any objection to the petition or to the tax bill."

Also the following:

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"In addition to the facts heretofore agreed upon, it is agreed that the judgment for hydrant rental mentioned in the first agreed statement of facts, resulted from the litigation reported in Water Works Company v. Carterville, 142 Mo. 101, and again in 153 Mo. 128; that the hydrant rental ordinance or contract referred to in 142 Mo. was submitted to the voters of the city of Carterville for ratification, as stated in that opinion, and that the same was ratified; that in the ordinance so submitted for ratification, no provision was made for the levy of a special tax to pay the hydrant rental therein provided for; that the ballot used in said election is not procurable; that after the affirmance of the judgment in favor of said Water Company by the Supreme Court in the opinion in 153 Mo., the city held an election to vote bonds for the purpose of paying off the judgment, the exact amount of which was then determined by a compromise, the Water Company making some concessions as to the amount; that the question of issuing the bonds for the purpose of paying the judgment was submitted to the voters and the required majority voted in favor of the issuance of said bonds; that the levy of taxes was thereafter made for the purpose of paying the interest and creating a sinking fund for the payment of said bonds; that defendant concedes that in the bond election the forms of the law were complied with, its objection to the levy being that the voting of these bonds for the purpose of paying an existing judgment debt was not an increase of the indebtedness of the city such as to authorize the levying of a tax in addition to the taxes provided for general purposes in section 11, article 10, of the Missouri Constitution, or that the same was not an increase of the indebtedness of the city such as is contemplated by section 12 of said article.

"It is understood that by the making of this agreed statement, the defendant does not waive its objection to the sufficiency of the petition, or to the sufficiency and competency of the tax bill in evidence. Defendant expressly reserves the right to urge those objections."

The judgment was for the full amount of said taxes.

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I. Appellant contends that the city was without power to levy any tax to pay the bonds and the interest thereon beyond the levy of the annual rate of fifty cents on the hundred dollars' valuation. The substance of its contention is that the debt of the city was incurred without any two-thirds vote authorizing the incurring of a debt beyond the annual revenues of the city, and that the debt, being thus incurred without such vote, could not later be validated by the vote in pursuance of the compromise. In other words, that the vote must precede the creation of the debt, and can not validate a debt already created.

Levy to Pay Debts. Section 12 of article 10 of our State Constitution provides two ways in which a city may become indebted;

1. It may, during any year, without any vote of the people, incur debts to an amount not exceeding the revenue provided for such year.

2. By a two-thirds vote it may become indebted in amount not exceeding five per cent. of its assessed valuation.

The city, under the first head above mentioned, clearly had power to contract for its supply of water to such extent for each year as could be paid for out of its annual revenue for such year.

It seems that the city, after contracting for its water supply, spent its revenues for other things and left the water bills unpaid. The water company sued, and after thorough litigation, the judgment was recovered and affirmed. It was so affirmed on the theory that the city had made its contract in pursuance of the first power above mentioned under the Constitution. The question then arises, When a city contracts for anything (water for instance) within the limits of its annual revenue, then spends that revenue for other things, must it pay the water bill out of the general funds realized by the levy of the "annual rate" for a subsequent year or years, or can it levy a special tax for the purpose.

Prior to 1875 there was no constitutional limitation on the power of a county or city to incur debts. Revised

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Statutes 1835, page 153, section 7, provided: "All county warrants shall be received in payment of taxes, fines, penalties and forfeitures accruing to the county." In State ex rel. v. Payne, 151 Mo. 663, it was held that such statute was invalidated by the Constitution of 1875, and that the current revenues of a county could not be diverted to the payment of warrants of previous years until after all current expenses of the county for the years were paid. It was there said if such division of the county revenues should be allowed, the current bills would go unpaid and there would result "a complete suspension of the business affairs of a county."

The General Statutes of 1865, page 650, section 77, provided: "Whenever an execution, issued out of any court of record in this State against any incorporated town or city, shall be returned unsatisfied, in whole or in part, for want of property whereon to levy, such court, at the return term or any subsequent term thereof, may, by writ of mandamus, order and compel the chief officer, trustees, council and all other proper officers of such city or town, to levy, assess and collect a special tax to pay such execution and all costs."

That section, as since amended, is section 2254 of our Revised Statutes, which reads:

"Whenever an execution, issued out of any court of record in this State, against any incorporated town or city, shall be returned unsatisfied, in whole or in part, for want of property whereon to levy, such court at the return term or any subsequent term thereof shall, by writ of mandamus, order and compel the chief officer, trustees, council and all other proper officers of such city or town, to levy, assess and collect the annual taxes in such town or city from year to year, as occasion may require, within the constitutional limits, and order the same, when collected by the proper officer or officers, to be paid to the execution creditor, his agent or assigns, except such amount as may be necessary to pay the reasonable salary allowed by law to the mayor, council, assessor, marshal, constable, attorney and a reasonable police force of any such town or city."

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The constitutionality of that statute has never been discussed in any decided case. But, if the Legislature cannot compel a county to pay warrants of prior years out of its current revenues leaving current bills unpaid, how can it compel a city to devote all its current revenues, except the part necessary to pay salaries of its officers and the police, in payment of old debts? How long could a city exist and perform its functions as such under such conditions?

We hold that the above-mentioned sections of our State Constitution are intended to give the city authority to levy the annual rate for city purposes and to spend it all if it sees proper, in paying its current expenses of all kinds, and that it is beyond the power of the Legislature to divert those current funds to the payment of debts of any kind of prior years.

We further hold that when a city contracts a valid debt for current expenses in any year, then spends for other purposes its current funds for that year, leaving such debt unpaid, the city has the power to levy a tax in excess of the annual rate for city purposes, in order to pay that debt. The power of the city is coextensive with the rights of a creditor. The creditor has the right to insist that his valid claims shall be paid. He is not entitled to be paid out of the current funds raised by the levy of the annual rate for city purposes, for that would be to take away the city's means of existence. It results that the creditor has the right to demand that the debt be paid out of the current funds if the city has enough of it left over after payment of current expenses, or by a levy of a tax over and above such annual rate. The facts in this case show that the city levied its full annual rate, and, in addition thereto, levied this special tax to pay these bonds. It was within its right and duty in so doing.

II. In *Conner v. Nevada*, 188 Mo. 148, it was held that the constitutional limitations on the indebtedness of cities do not relieve the city from liability in actions *ex delicto*.

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In State ex rel. v. City of Neosho, 203 Mo. l. c. 82, it was said:

"The contract in question provides for the creation of a special and particular fund without resorting to the power of public taxation; and the waterworks ^{Bonds a New Debt} company and Smith, its assignee, may look alone to that fund in the first instance—what might happen if the city tortiously misappropriated and dissipated that fund, we need not inquire. Such acts might (or might not) render the city liable as for a tort; and the liability for torts is not one within the constitutional provision under consideration. [Conner v. City of Nevada, 188 Mo. 148.] But that question is not here, and, therefore, is not decided."

Now in this case the city, as above stated, after making the contract for water, spent the funds applicable to the payment for that water for other purposes. It may be that it was liable *ex delicto* for such misappropriation. We will not decide that question. But it should be remembered that, according to the agreed facts, the city and the water company settled all these perplexing questions by the compromise under which the bonds were issued, such issue having been authorized by a two-thirds vote at an election called for that purpose. If the debt evidenced by the bonds was not a *new* debt, it was certainly a very different debt from that evidenced by the judgment for the payment of which they were issued.

III. Appellant insists that the back tax bill does not show with sufficient clearness the purpose for which the "special" taxes and the taxes marked "sewer fund" were levied.

In Lamar W. & E. L. Co. v. City of Lamar, 128 Mo. 188, l. c. 215, it was said:

"The tax authorized by section 12 is not therein called a 'special' tax, but an 'annual tax.' Mere names, however, are of slight weight in such an investigation. The real inquiry should be whether a tax imposed under section 12 can, upon due consideration of the practical

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ends in view in these sections, be held to be included by the term 'special' tax in section 11, within the intent of the Constitution."

Taxes, like roses, are about as sweet under one name as another. The law does not require that the back tax bill shall state a full and complete cause of action for the taxes.

The judgment is affirmed. *White, C.*, concurs.

PER CURIAM: The foregoing opinion of Roy, C., is adopted as the opinion of the court. All of the judges concur.

PAUL TURNBOW, By His Next Friend, ORAH TURNBOW, Appellant, v. R. J. DUNHAM et al.,
Receivers of METROPOLITAN STREET
RAILWAY COMPANY.

Division Two, July 27, 1917.

1. **NEGLIGENCE: Child Near Track: Ordinary Care Towards Persons.** An instruction telling the jury that "a motorman in charge of a street car is only required to exercise towards persons near its tracks ordinary care to prevent injury to persons if near the track" would not by using the word "persons" cause the jury to infer that a three-year-old child is to be considered as an adult, and is not error.
2. _____: _____: **Precaution After Danger Seen.** An instruction which tells the jury that before they can find for plaintiff they must find that defendant's motorman was guilty of negligence in not taking such precautions as a reasonably prudent person would have done under the same circumstances, to avoid injuring the three-year-old child, in the street between the curb and track, "after the motorman saw him in a position of danger from being run over by the rear wheels of the car," is erroneous. The rear wheels having run over the child's feet, the instruction relieved defendant of liability if the motorman failed to see him in a position of danger from being run over by them, whether such failure to see was or was not the result of the motorman's negligence.

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3. ——: ——: Use of Word Ran. An instruction that assumed that the three-year-old child "ran" towards the car as it passed, where there is no evidence that he ran, while not reversible error, would be more technically accurate if it used the word "move."
4. ——: ——: Contest Between Persons of Equal Standing. Where the rear wheels of a street car ran over the feet of a three-year-old child, and he sues for damages, an instruction telling the jury that the case should be "considered the same as if it was a contest between two persons of equal standing in the community" should not be given, because it is apt to mislead the jury into believing that the defendant owed to the child no greater duty to look out for its safety than it owed to an adult under like circumstances.
5. ——: Unavoidable Accident: Instruction. Where the issue raised by the facts is simply one of negligence *vel non* of the motorman, and there is no evidence of any accident within the proper meaning of the term, an instruction telling the jury that if they believe and find from the evidence that plaintiff's injuries were "due to an unavoidable accident and not to any negligence of the motorman," should not be given.
6. ——: Approximate Cause: Undefined. The use of the words "approximate cause" in an instruction, without defining or explaining the term, tends to mystify, rather than to aid the jury in reaching a correct conclusion.
7. ——: Child in Street: Demurrer to Evidence. When a demurrer to the evidence is considered, plaintiff is entitled to have it viewed in its most favorable light; and where there is evidence tending to show that a child less than three years of age, unattended, stepped from the curb into the street as the street car slowly approached; that as the front of the car passed him he was standing five feet from the track, to which position he had approached from the curb while the car had traveled twenty feet; that the motorman saw him and watched him only until the front trucks had passed beyond the position of the child, and then ceased watching him and started to increase the speed, a demurrer to the plaintiff's case of damages for negligence should not be given; for evidently after the front trucks passed, the child moved a step or two closer to the car and placed his hands against the side thereof (as some of the evidence tended to show) and was thrown off his feet and fell in such a way that his feet became entangled under the rear wheels, which ran over them. The motorman's duty of exercising ordinary care for the child's safety was not fully performed by watching the child only until danger from the front trucks was passed.
8. ——: ——: Moving Car Slowly: Lookout. A motorman seeing a child of tender years on the street moving towards the track does not by moving slowly relieve himself of the duty of keeping a lookout for the child until it is out of danger.

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Appeal from Jackson Circuit Court.—*Hon. Kimbrough Stone, Judge.*

REVERSED AND REMANDED.

John N. Southern for appellant.

(1) The use of the words "person" and "persons" approaching the tracks of a street car, in respondents' instruction, does not express the law of this case, but the contrary. And the use of the word persons in defendant's instruction number six also erroneously directed the jury in the case at bar. *Simon v. Railroad*, 231 Mo. 74; *Childers v. Railroad*, 141 Mo. App. 684. (2) There was no evidence to support instruction given for defendant to sustain the proposition that the motorman took precautions to avoid injuring the child, at the time the front trucks safely passed him, the appellant herein, but positive evidence to the contrary. It assumes facts not in evidence and eliminates essential elements from consideration of the jury. *Simon v. Railroad*, 231 Mo. 80; *Schumaker v. Breweries*, 247 Mo. 161; *Sinamon v. Moore*, 161 Mo. App. 168; *Bouillon v. Laclede Co.*, 165 Mo. App. 321; *Kendrick v. Davis*, 156 S. W. 490. (3) The court erred in giving for respondent instructions assuming that there was evidence that the child ran from where the motorman claims to have seen him, when the front trucks passed him, to and under the rear wheels of the car. The record contains no evidence to that effect. *Eckhard v. Transit Co.*, 190 Mo. 620; *Shanahan v. Transit Co.*, 109 Mo. 233. (4) Respondent's instructions on proximate cause, are not applicable to this cause, for the reason that the appellant, at the time of the injury, was a mere child and known to be so by the motorman, at the time of the collision resulting in the injuries. *Simon v. Railroad*, 231 Mo. 75; *Cytron v. Railroad*, 205 Mo. 719; *Meker v. Railroad*, 178 Mo. 186; *Livingston v. Railroad*, 170 Mo. 470; *Gringle v. Railroad*, 213 Mo. 114; *Cornovisky v. Transit Co.*, 207 Mo. 273. (5) Respondent's instruction that "If appellant's injuries were the result of unavoid-

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able accident and not the negligence of motorman," was reversible error. Simon v. Metropolitan, 178 S. W. 450. (6) The plaintiff under all the testimony in the case was entitled to a verdict in his favor and his motion for a new trial should have been sustained. Cytron v. Railroad, 205 Mo. 720; Livingston v. Railroad, 170 Mo. 452; Simon v. Railroad, 231 Mo. 74. (7) In respondents' instruction number 2, the court instructs the jury they must find "that defendant's motorman was guilty of negligence in not taking such precautions to avoid injuring the plaintiff after the motorman saw him in a position of danger, if you believe he was in a position of danger, from being run over by the rear wheels of the car, as a reasonably prudent person would have done under the same circumstances, and unless you so find, then, plaintiff cannot recover in this case and your verdict must be for the defendants," omitting to include in the instruction the necessary phraseology of the motorman's duty, "or by the exercise of ordinary care, might have seen him in a position of danger." This is fatal error and takes from the consideration of the jury, whether the motorman could, in the exercise of such care, have seen the child approaching the car, after it had stepped from the curb into the street.

L. T. Dryden for respondents.

(1) The defendant's peremptory instruction in the nature of a demurrer to all the evidence should have been sustained, no negligence whatever upon the part of the motorman having been shown. 2 Nellis on Street Railways (2 Ed.), p. 937, sec. 410; Budger v. Albany St. Ry. Co., 42 N. Y. 459; Boland v. Railroad Co., 36 Mo. 492. (2) These instructions, it seems need only be read to convince the court that they correctly state the law if the appellant was entitled to go to the jury at all. The first simply told the jury that the motorman should have exercised such care as a reasonably prudent person under the circumstances would have done. The second calls the jury's attention to the fact that because the real defendant in the case was a corporation should

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not in anywise mitigate against it in arriving at a verdict. Feary v. Metropolitan St. Ry. Co., 162 Mo. 97; State v. Talbott, 73 Mo. 347. (3) Complaint is made that the term "proximate cause" is not defined, and that the instructions are not applicable to this case. The term "proximate cause" is defined in instruction 9. The jury unquestionably understood that by the term "proximate cause" was meant the negligence of the motorman as defined in other instructions that caused the unfortunate accident. Battles v. Railroad, 178 Mo. App. 596; Kelley v. Railroad, 75 Mo. 138; Warner v. Railroad, 178 Mo. 125; King v. Railroad, 211 Mo. 1; McGee v. Railroad, 214 Mo. 544; Schmidt v. Transit Co., 140 Mo. App. 182. (4) Appellant complains of instruction 2, given at the instance of respondents. There might be cases where the evidence would be such that the instructions ought to be as contended by appellant's counsel; but in this case there are two reasons why this instruction correctly stated the law as applicable to the facts in this case, to-wit: First, the motorman himself testified that he saw the child when he started the car from the west side of Union Street and until after the front part of the car had passed it. So it was not a question of what he might have seen, because he actually did see, and the question here is what he should have done under the admitted fact that he actually saw the child. Second, appellant submitted the case under this theory as will be seen by instruction 1 as amended by the court, given at the instance of appellant.

WILLIAMS, J.—Plaintiff, a minor three years of age, sues, by next friend, to recover the sum of thirty thousand dollars for the loss of both feet. The injury is alleged to have been caused by the negligence of the defendant in the operation of its street car. Trial was had in the circuit court of Jackson County, at Independence, resulting in a verdict for the defendant. Plaintiff has duly appealed.

The evidence was substantially as follows:

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The injury occurred about six p. m., March 29, 1912, near the point where the east line of Union Street intersects Lexington Street at Independence, Missouri. Lexington Street, upon which the defendant's double street-car tracks are situated, runs east and west. Union Street crosses it at right angles. A grocery store is on the south-east corner of this crossing. The car which injured plaintiff was an east-bound car, operated on the south tracks. Union Street, at its intersection with the south line of Lexington Street, was forty feet in width. The distance from the curbing, in front of the corner grocery store, to the south rail of the south track, was ten feet and five inches. Just prior to the accident the car in question made a stop on the west side of Union Street for the purpose of discharging passengers. One passenger alighted. Signal was then given for the car to start and the motorman started the car in the ordinary way and had proceeded to a point where the rear trucks of the car were almost directly north of the center of the grocery store, when a scream was heard and the car was brought to an immediate stop; some witnesses saying that it stopped in five or ten feet, others saying that it went as far as twenty-five feet. The scream heard was that of the plaintiff, and he was found lying with his feet (crushed) upon the south rail and his head and body toward the south. He was immediately taken to a near-by undertaking establishment, and the undertaker bound his limbs with a cord to stop the flow of blood. He was shortly removed to a hospital. Upon examination, amputation was found to be necessary, which was accordingly performed. Both feet were amputated a short distance above the ankle. In about two months the amputated limbs had healed and, later, at the trial, plaintiff was able to walk upon artificial limbs.

A lady passenger on said car was standing near the front vestibule, and as the front of the car passed the grocery store she saw the child standing in the street at a point about half way between the car and the curb. The child was facing the car. The witness said the child might have been walking slowly, but she was not sure.

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After the car had moved a short distance she heard a child scream, and the car was stopped and the injured child picked up.

One of the gentlemen passengers testified that as the car was crossing Union Street he saw the motorman look out the door and heard him apply the air. The witness then looked out the window to see what the trouble was, and saw the child lying face downward with its feet on the track, about one foot in advance of the rear trucks. Immediately thereafter the child screamed and the car was brought to a stop.

A clerk in the corner grocery looked out as the car was passing. He states that it looked like the child had his hands on the side of the car along about the center of the car. He saw the little boy fall and the rear wheels run over his feet. This witness was the first one to the injured child. He picked the child up, carried him in and called a doctor.

Plaintiff used the motorman as a witness. The motorman testified that he first saw the child just as he started his car from the west side of Union Street. At that time the child was on the sidewalk in front of the grocery store. About the time the front of the car reached the center of Union Street, he saw the child step down into the street, facing north and looking into the motorman's face. When the motorman saw the child step into the street he states that he turned off the power, lowered the speed to about one mile an hour, so that the car was barely moving, and got the car under perfect control. He stated that he could not tell what the child would do; that he feared the child would get in front of the car and for that reason took the above precautions. He stated that the child did not take any further steps after stepping into the street, but was standing in that position (a distance of eight or nine feet from the south edge of the car) when the front end of the car passed the child. The motorman last saw the child through the door of the front part of the car. The child was then at a point due south of the front trucks and, according to the motorman's testimony, was

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standing at the same position as above described. After the front trucks passed the child the motorman says that he "fed up" or increased the speed of the car; that he thought the child was safe after the front trucks had passed the child. In a few seconds he heard the child scream and immediately stopped the car. The evidence shows that the clear space between the front and the rear trucks was about twelve feet in length, and that the distance from the center of the rear wheel on the front truck to the center of the front wheel on the rear truck is sixteen feet and six inches. The body of the car extends fifteen inches beyond the rail.

The defendant introduced in evidence the original petition in the case for the purpose of showing that under the allegations of that petition it was stated that the child stood in the street, and that the petition contained no allegation that at any time the child was approaching or attempted to cross the street.

In rebuttal the plaintiff offered a portion of the motorman's deposition which was taken after the original petition was filed. In the deposition the motorman was reported as testifying that he first saw the child next to the curb and that the child took a step or two towards the car. This was offered for the purpose of explaining why the amended petition was filed.

Appellant attacks defendant's instructions 1, 2, 3, 4, 6, 7 and 8 which were as follows:

"1. The court instructs the jury that a motorman in charge of a street car is only required to exercise toward persons near its tracks ordinary care to prevent injury to persons if near the track and if he does this he is guilty of no negligence. If you believe that the motorman, Sherman, did all that a reasonably prudent person under the same circumstances would have done to prevent injury to plaintiff, then he was guilty of no negligence and plaintiff cannot recover in this case and your verdict must be for defendant.

"2. The court instructs you that before plaintiff is entitled to recover in this case plaintiff must show to your reasonable satisfaction by a preponderance of

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the credible evidence, that is, by the greater weight of the credible testimony offered in the case, that defendant's motorman was guilty of negligence in not taking such precautions to avoid injuring the plaintiff *after the motorman saw him in a position of danger*, if you believe he was in a position of danger, from being run over by the rear wheels of the car, as a reasonably prudent person would have done under the same circumstances, and unless you so find, then plaintiff cannot recover in this case and your verdict must be for the defendants.

"3. The court instructs the jury that if you believe and find from the evidence in this case that at the time *the front trucks of the car safely passed the plaintiff*, he was standing still and that there was nothing in his manner to indicate to the motorman that the child would run against the car or under the rear trucks and that a reasonably prudent person situated as the motorman was, would not have reasonably anticipated that the child would run under the rear trucks of the car and that the motorman took all the precautions to avoid injuring the child that a reasonably prudent person would have done under the same circumstances then plaintiff cannot recover in this case and your verdict must be for the defendants.

"4. The court instructs the jury that if you believe and find from the evidence that a reasonably prudent and careful person placed in the position of the motorman at the time would not have reasonably anticipated that plaintiff, *after the front trucks of the car had safely passed him*, under all the facts and circumstances detailed in evidence, would run against the car or under the rear trucks, then the motorman, Sherman, did all that was required of him, and he was guilty of no negligence, and plaintiff cannot recover, and your verdict must be for the defendants.

"6. The court instructs the jury that this case should be considered by you the same as if it was a contest between *two persons of equal standing in the community*; the fact that one of the parties is a corporation

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should not and must not affect your minds in any way in the consideration of the case; the rights of the parties should and must be determined upon the evidence introduced, and the instructions given to the jury, which are the law and the only law to guide you in your deliberations.

"7. The court instructs the jury that if you believe and find from the evidence that plaintiff's injuries were *due to an unavoidable accident* and not to any negligence (as defined in other instructions) on the part of defendants' motorman in the management of defendants' car, at the time, then plaintiff cannot recover, and your verdict must be for the defendants.

"8. The court instructs the jury that in this case the burden of proof rests upon the plaintiff to prove to your reasonable satisfaction, by the preponderance of the credible testimony, that defendants were guilty of negligence as submitted to you in these instructions; and unless you believe and find from the evidence in this case that the plaintiff has proven, by a preponderance of the credible testimony, to your reasonable satisfaction that the defendants were guilty of negligence as defined in these instructions, and that such negligence was the *proximate cause* of the injuries complained of, then you cannot find for the plaintiff."

I. It is contended by appellant that the court erred in giving defendant's instructions, numbers 1, 2, 3, 4, 6, 7 and 8. The instructions will be found copied in full in the foregoing statement.

It is contended that the use of the word "persons" in instruction numbered 1 is erroneous; that it has the effect of classifying plaintiff as an adult and is subject

Instruction No. 1. to the criticism given a similar instruction in the case of Simon v. Railway, 231 Mo. 65, l.

c. 74-75. We do not agree with appellant's contention in this regard. The instruction criticized in the Simon case was entirely different from the one now before us. In the Simon case the instruction told the jury that "the fact that a *person* leaves the sidewalk and comes near the track is not enough in itself to im-

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pose the duty on the motorman to stop the car." The court held that the above was a proper declaration of the law as to an adult approaching the tracks, but was inapplicable when a child of tender years approached the tracks. The instruction in the case at bar declares it to be the duty of the motorman to exercise ordinary care to prevent injuring persons near its tracks. We find no fault with that statement of the law. It was the duty of the motorman to exercise ordinary care to prevent injuring persons near the tracks, whether they were adults or children of tender years. There is nothing in the instruction which would cause the jury to infer that the plaintiff in this case was to be considered as an adult for the purpose of determining the requirements of the duty to exercise ordinary care, imposed upon the motorman.

The second instruction, in effect, told the jury that before they could find for the plaintiff they must find that defendant's motorman was guilty of negligence in not taking such precautions as a reasonably prudent person would have done under the **Instruction No. 2**. same circumstances, to avoid injuring the plaintiff, *after the motorman saw him in a position of danger from being run over by the rear wheels of the car, etc.*

We think the above instruction clearly erroneous. By that instruction the defendant was virtually relieved from liability if the motorman failed to see plaintiff in a position of danger from being run over by the rear wheels of the car, whether such failure to see was or was not the result of negligence upon the part of the motorman. That the child did get into a position of danger from being run over by the rear trucks is very clear from the evidence; because he was, as shown by all the evidence, run over by the rear wheels of the car. It also appears from the evidence that the motorman did not see the child just as it was approaching or about to come in contact with the rear wheels. So far as the testimony discloses, the motorman last saw the child when he was standing alongside of the front trucks and

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a few feet out from them. The motorman could have seen the child approach the track and come within danger of the rear wheels had he been looking out at the child. Did ordinary care, under the circumstances, require him to look and see? We are not called upon to answer that question *as a matter of law* but it was certainly an issue of fact that the jury should have passed upon. If the motorman saw or could, by the exercise of ordinary care, have seen the plaintiff in a position of danger from being run over by the rear wheels then it was certainly his duty to use ordinary care to prevent the injury. The instruction, therefore, erroneously omits from the jury's consideration the important question of fact as to whether or not the motorman could, by the exercise of ordinary care, under the circumstances, have seen the child in a position of danger from being run over by the rear trucks.

It is contended that instructions three and four are erroneous in that they each assumed that the child "ran" from the point where the motorman last saw him, to and

Instructions 3 and 4. under the rear tracks, and that there is no evidence that he "ran" under the car. Tech-

nically speaking, perhaps the use of the word "run" in the instruction is improper. The word "move" would better express the correct idea. It does appear from the evidence that he moved from the curb to a place under the wheels; whether he walked or ran does not appear. No doubt, however, the word "run" was intended to be used in the sense of "move" and was so understood by the jury. We are unwilling to say that this slight mistake, under the facts of this case, would amount to reversible error, but, since the case must be retried, we suggest that the matter be corrected if the facts remain the same and the instruction should be again offered.

The sixth instruction told the jury that the case should be "considered the same as if it was a contest between two persons of equal standing in the commu-

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nity." This instruction, when applied to a case wherein the parties are adults, or where one is an adult and the other a corporation, has been held to announce a correct rule of law (Feary v. Met. St. Ry. Co., 162 Mo. 75, l. c. 97); but where, as here, one of the parties is a mere infant three years of age, the instruction should not be given, because it is apt to mislead the jury into believing that the infant plaintiff should be considered in the status of an adult so far as the duties of the defendant to look out for its safety was concerned. An ordinarily prudent person, exercising ordinary care for the safety of others, would certainly be expected to exercise greater precaution to protect a child near the track than would be required in protecting an adult. The adult is presumed, in a certain measure, to look out for his own safety. No such presumption surrounds the treatment to be accorded a more infant.

The seventh instruction should not have been given in this case, because there was no evidence of any accident within the proper meaning of that term. The is-

sue raised by the present facts was simply one of negligence *vel non* of the motorman.

Instruction No. 7. Under such conditions the instruction should not be given. [Simon v. Metropolitan St. Ry. Co., 178 S. W. 449, wherein the decisions on the question are reviewed; Wise v. Transit Company, 198 Mo. 546, l. c. 559-560.]

The eighth instruction is subject to criticism because it uses the term "approximate cause" without defining or explaining it. It was said in the case of Montgomery

Instruction No. 8. v. Railroad, 181 Mo. 508, l. c. 513, that the use of the term "proximate cause" unexplained in an instruction would tend to mystify rather than aid the jury in reaching a correct conclusion. Subsequent instructions for defendant, in the present case, did, in a way, tend to explain the term, we think, and for that reason the use of the term may not have resulted in error in this case. The purpose of instruc-

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tions, however, is to enlighten, not to mystify, the jury and, since the case must be retried, we would suggest that the instructions as to this point be made clear, so that all danger of the jury being misled thereby may be obviated.

Other errors urged by appellant are not such as will likely reoccur upon another trial. For that reason we deem their discussion now unnecessary.

II. It is contended by respondent that even though it be conceded that error occurred in the giving of some of defendant's instructions yet the judgment should not

Demurrer to Evidence. be reversed because it was for the right party; that defendant's demurrer to plaintiff's evidence offered at the close of the case should have been sustained because the plaintiff failed to make even a prima-facie case for the jury's consideration.

We are unable to agree with the contention that the case should not have been submitted to the jury. In passing upon a demurrer to the evidence, plaintiff is entitled to have the same viewed in its most favorable light.

There was evidence in this case tending to show that this little child, less than three years of age, stepped from the curb into the street as the car slowly approached; that as the front of the car passed the child he was standing half way between the car and the curb (if that were true the child was approximately five feet from the nearest rail); the motorman saw the child and watched him only until the front trucks had passed beyond the position of the child; the motorman then ceased watching the child and started to increase the speed of the car; he explains that his reason for watching the child up to that point was because "You can't tell what a child will do." Evidently after that time the child moved a step or two closer to the car and placed its hands against the side thereof and was thrown off its feet and fell in such a way as to engage his feet under the rear wheels of the car.

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Under the above conditions, can it be said, *as a matter of law*, that defendant's duty to exercise ordinary care to protect the child from injury had been performed when it merely watched long enough to see that the child was not injured by the front trucks and that a like duty did not also exist with reference to preventing injury from the rear trucks?

Would all reasonable minds agree in saying that when a child three years of age is seen, unattended, standing within five feet of a street car track (to which position he had moved from the curb while the street car, moving very slowly, had approached a distance of twenty feet, half-way across Union Street) the duty of the persons operating the car, to exercise ordinary care for the child's safety, had been fully performed by watching the child until danger from the front trucks of the car was past and that no precautions should have been taken to protect the child from possible action on its part which might bring it within the danger of the rear wheels? We think not. Some reasonable minds might suggest that the child, because of its tender years and, therefore, its likelihood of "doing the wrong thing at the right time" was in a position of peril and that the car should have been stopped until the danger was averted. [Simon v. Railway, 231 Mo. 65, l. c. 78]. Other reasonable minds might suggest that if the car were to be moved forward at all under the conditions there existing that it should be done in a watchful and careful way so that the car could be stopped in time to avert any actual danger that might develop. [Simon v. Railway Co., supra, l. c. 78-80].

The mere fact that the car was moved very slowly while it passed the child does not relieve the situation. A car moved, slowly, without keeping a lookout for the child, was just as likely to injure the plaintiff as if it were moved rapidly. In fact the slower the movement the greater the time allowed for the child to move under the same.

The matter fully and carefully considered, we are of the opinion that it was for the jury, properly in-

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structed, to determine whether the defendant performed its duty in exercising ordinary care, under the circumstances, to protect the child and prevent his injury.

The judgment is reversed and the cause remanded. All of the judges concur.

SPOTTSWOOD D. BURNETT, Appellant, v.
CHARLES W. PRINCE.

Division Two, July 27, 1917.

1. **ABSTRACT:** Judgment for Defendant. An abstract of the judgment in the words: "March 4, 1914. Jury returned a verdict for defendant and judgment accordingly for defendant" sufficiently describes a judgment for defendant for purposes of appeal.
2. ——: Filing Bill of Exceptions. If the abstract of the record proper shows appellant was granted leave to file a bill of exceptions within a designated time and that before the expiration of that time the bill was allowed and filed, it shows that the bill was "duly filed" within the meaning of those words as used in Rule 31.
3. **WAIVER:** Proof of Necessary Averment. The plaintiff may waive proof of a necessary averment in defendant's answer by trying the case as if the proof had been made.
4. **DEPOSITION:** Notice. Authority to take depositions is purely statutory, and while they may be taken conditionally, no officer, who is without a commission issued out of a court of record, has authority to take testimony or compel the attendance of witnesses by issuing subpoenas until the proper service of a proper notice of the time and place.
5. ——: Subpoena Before Notice: Subsequent Service. A subpoena issued before notice to take deposition is served, is issued without authority. And being unauthorized when issued, a subsequent service of the notice and subpoena at the same time will not give it validity.
6. ——: ——: False Imprisonment. A person who issues a writ for the arrest of another is liable for an action for false imprisonment if he is without authority to issue it. So that a notary who issues a subpoena for a witness before service of notice to take depositions, is without authority to issue a writ of at-

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- tachment for such witness on his failure to obey the subpoena, and is liable in an action for false arrest if the witness is attached.
7. ——: Notice Naming Wrong Place. A notice to take depositions in a suit pending in Independence, which names Kansas City instead of Independence as the place where the suit is pending, will not authorize the officer to enforce the attendance of witnesses. The statute makes the courts at the two places distinct and separate courts.
8. ——: ——: Mitigation: Nonsuit. Knowledge by the witness that the notice to take depositions wrongfully named Kansas City instead of Independence as the place where the suit is pending and a concealment of that knowledge for the purpose of creating a damage suit, go to mitigation of damages in a suit for false arrest for failure to obey the subpoena, but will not authorize a nonsuit.
9. ——: ——: Waiver. A signing of an acknowledgment printed on the notice to take deposition, to the effect that defendant acknowledges the service of notice, waives the issue of *dedimus* and all exceptions to time, etc., has no more effect than its terms import. It does not authorize the taking of depositions in a suit filed in a different place from the one mentioned in the notice. Such waiver would not confer validity on a void subpoena issued before the waiver.

Appeal from Jackson Circuit Court.—*Hon. Daniel E. Bird, Judge.*

REVERSED AND REMANDED.

J. D. Shewalter for appellant.

(1) Any illegal restraint of another constitutes false imprisonment. *Boeger v. Langenberg*, 97 Mo. 390; *McCaskey v. Garnett*, 91 Mo. App. 354. But when plaintiff showed his imprisonment defendant "may justify my showing legal process but he must plead it." *Thompson v. Buchholz*, 107 Mo. App. 121. The amended answer so far from showing legal process as a defense, alleged facts which show that the process was illegal. This alleged a suit in another court and also a subpoena to appear which was void for the reason that it was issued before any notice, even if it had been issued in a pending suit. *Ex parte Canada*, 151 Mo. App. 710; *Millspaugh v. Railroad*, 138 Mo. App. 31. (2) But the process on which

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the defendant was arrested was wholly illegal and the arrest thereunder was false imprisonment.

Glen Sherman, J. E. Westfall and J. N. Beery for respondent.

(1) The appeal ought to be dismissed for the reason that the pamphlet purporting to contain the record proper, the bill of exceptions, statement, points and authorities, brief and argument are so commingled as to render it practically impossible to intelligently distinguish one part from the other. Royal v. Railroad, 190 S. W. 573. (2) The pamphlet purporting to contain an abstract of the record proper fails to show the term of court, if any, when the motion for a new trial was ruled upon, for the nature of the motion for a new trial. True, the pretended abstract of the record refers to the bill of exceptions, but this court cannot be referred to the bill of exceptions. Under the rules of this court the abstract of the record proper shall "set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision." Coleman v. Roberts, 214 Mo. 634; Sonnenfeld v. Rosenthal, 247 Mo. 265; Strother v. Barrow, 246 Mo. 241; Steel Co. v. Cottengin, 179 Mo. App. 397; Merrill v. Trust Co., 46 Mo. App. 242. (3) The sufficiency of the evidence to warrant the verdict and judgment is not complained of by the appellant in his assignment of errors or points and authorities or in the argument, it is taken as confessed that the point so raised is not well taken and is abandoned by the appellant. Crowell v. Linseed Co., 255 Mo. 305; Pale v. Insurance Co., 173 Mo. App. 485; Meredith v. Whitlock, 173 Mo. App. 542. (4) The notice was sufficient. The notice gave the title of the case, the court in which the cause was pending, the time when and the place where the depositions would be taken. Moreover, the defendant agreed in writing that the depositions may be taken. Sec. 6392, R. S. 1909; Ornisby v. Granby, 48 Vt. 44; Grocery Co. v. Stevens, 65 Ill. App. 609; Murray v. Phillips, 59 Ind. 56; Lumber Co. v. Fidelity & Deposit Co., 161 Col. 397.

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The notice given for the taking of the depositions contains this memorandum, signed by the appellant. *Delisle v. McGillivary*, 24 Mo. App. 680; *Seymour v. Farrell*, 51 Mo. 97. (5) There is only one circuit court of Jackson County. "The Sixteenth Judicial Circuit shall consist of the county of Jackson." Sec. 3995, R. S. 1909. (6) The clerical error of describing the circuit court of Jackson County, as being at Kansas City, is merely unnecessary description, and may be rejected; there being only one circuit court, legally known as the Sixteenth Judicial Circuit Court consisting of Jackson County, such description could not possibly have misled the appellant. *Rand v. Dodge*, 17 N. H. 354; *Thompson v. Stewart*, 3 Conn. 180.

WHITE, C.—The suit is for damages for false imprisonment, brought in the Jackson County Circuit Court. On the trial of the cause, March 4, 1914, after all the evidence had been introduced by both the plaintiff and the defendant, the court instructed the jury to return a verdict for the defendant.

On the 14th of November, 1907, the plaintiff herein was arrested on an attachment issued by W. W. Calvin, notary public, on account of his failure to appear on that day and give his deposition in a case pending in the circuit court of Jackson County, Independence Division, wherein B. C. Boyles was the plaintiff, and the plaintiff here, S. D. Burnett, was the defendant. Plaintiff was arrested at his farm, some four or five miles from Independence, and taken by the constable under the attachment to the office of Calvin in Kansas City where he arrived about five or six o'clock p. m. The notary discharged him upon being informed that the notice to take depositions was irregular in particulars explained below. This arrest furnished ground for the cause of action charged in the petition.

The answer alleges that a suit was filed in the case of *Boyles v. Burnett* on the 11th day of November, 1907, in the circuit court of Jackson County, at Independence, and on the same day a notice was served on the plain-

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tiff herein that depositions would be taken in the cause on the 14th of November, 1907; but by a mistake in writing the notice, it recited that the cause was pending in Kansas City instead of Independence; that on the same day, November 11th, this plaintiff was served with subpoena to appear on the 14th before the notary named therein and give his deposition in said cause; summons was served on the plaintiff herein on the 12th day of November, 1907, whereby he became apprised of the mistake in the notice to take depositions, but concealed that knowledge from the defendant herein for the purpose of creating a damage suit, and plaintiff would not have been molested if he had revealed the fact of such mistake.

The plaintiff claimed, as shown by his reply and his evidence introduced at the trial, that the suit on which the notice was served was not filed until November 12th, and therefore when the notice to take depositions was served upon him there was no suit pending corresponding to the notice, for which reason he was not bound to appear. It was further claimed by the defendant that inasmuch as the notice to take depositions stated that the depositions were to be taken in a suit pending in Jackson County at Kansas City, it was not notice of the suit actually filed, even if it had been filed at the time notice was served, because that suit was filed at Independence instead of Kansas City.

The notice to take depositions as copied in the record contains the mistake mentioned, but the subpoena alleged to have been served at the same time was not introduced by either party, nor any offer made by either party to show that it was lost or to prove its contents. The only evidence of the service of a subpoena on November 11th was that while plaintiff was on the stand, after stating that he had received the notice to take depositions, he was asked:

“Q. At the same time you got a subpoena to appear at Mr. Prince’s office to give your deposition on the 14th day of November, didn’t you? A. Yes, sir.”

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As further justification, apparently, for issuing the attachment, another subpoena was introduced in evidence dated November 13th. This subpoena was placed in the hands of the constable at the same time he received the attachment on the 14th, and he took both the subpoena and attachment and served the subpoena at the same time he made the arrest in the afternoon of the 14th.

To prove the suit was filed November 11th, defendant offered the petition in the case of Boyles v. Burnett, showing the rubber stamp file mark as follows: "Filed Nov. 11, 1907, Oscar Hochland, Clerk, by A. R. White, Deputy."

On the part of plaintiff two deputy clerks were introduced and identified books kept in the office of the clerk of the circuit court which purported to contain entries made when cases were filed. In each of these some entry in relation to filing the case of Boyles v. Burnett, No. 18,750, appears under date of November 12, 1907. These books also showed several other entries on the day's business of November 12th, before the entries in relation to the case of Boyles v. Burnett. The two deputy clerks who testified to these matters explained that the rubber filing stamp had an arrangement by which they would move up the date each morning in order to change it from the previous day and stated that they would sometimes forget to change it in the morning until after they had used the stamp; that the stamped date on the petition, "November 11, 1907," possibly was made in that way on the morning of the 12th before they discovered it had not been moved up, and that according to this record the suit must have been filed on November 12th. The deputy, A. R. White, who stamped the file mark on the petition as of the date of the 11th and in whose handwriting appeared the entry on one of the books, stated he could not remember the filing of the case, but thought that the file mark was correct.

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I. Almost the entire space in respondent's brief is taken up with numerous objections to the record. Because these objections are urged so persistently we notice a few of them as follows:

Abstract. It is asserted that the abstract of the record proper fails to abstract any final judgment rendered. The abstract of the record proper shows the following:

"March 4, 1914. Jury returned verdict for defendant and judgment accordingly for the defendant."

This abstracts a judgment for defendant as fully as need be. If it were a judgment for plaintiff some further particulars as to the character of the judgment might be necessary, but being a judgment for the defendant this describes its character.

It is complained that the record proper fails to show that a motion for new trial was ruled upon "and the nature of the motion." After reciting the filing of the motion for new trial in due time on March 7, 1914, there follows this entry: "May 2nd, 1914, motion for new trial overruled." This record shows the motion was ruled on and the "nature" of the motion—it was a motion for new trial.

It is claimed that the record proper fails to show that any bill of exceptions was duly filed. The recital in the abstract of the record proper shows the following:

"May 2, 1914. Plaintiff granted leave to file bill of exceptions on or before November 1, 1914.

"October 31, 1914. Bill of exceptions allowed and filed."

It is urged by respondents that in the absence of a formal entry showing the filing of the bill of exceptions, the recital should contain the exact words required by Rule 31 of this court, which provides that it will be sufficient if the abstract states the bill of exceptions was "duly filed." Respondent lays immense emphasis upon the word "duly." One of the dictionary meanings of "duly" is "timely." Now, the word "filed" has a certain significance and if the bill of exceptions was "filed," and filed within the time provided, then it is "duly filed."

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Other objections of character similar to the above do not require discussion.

II. The defendant in answer to the allegations of the petition alleges a subpoena was issued and served on the 11th of November, which the plaintiff herein disobeyed and justified the issuance of the writ of attachment:

Waiver of Proof. It was necessary for the defendant to support that allegation by proof. None was offered; the alleged subpoena was not produced nor its loss accounted for, nor any evidence of its contents offered. The officer who served the notice to take depositions was not a witness. The only evidence of the service of a subpoena is in the ~~passage~~ from the testimony of the plaintiff quoted above. The statement he made does not designate nor identify the case in which the subpoena was issued. The appellant, however, seems to have waived that irregularity, and without requiring proof of the existence and formality of a subpoena in the proper case tried the case as if the subpoena had been issued and served. Therefore, for the purpose of this discussion, we shall have to assume that a subpoena, correct in form, was issued by the notary and served at the same time as the notice, on November 11th.

III. Courts at common law had no inherent power to authorize the taking of depositions. A court of chancery tried cases upon depositions and, upon a petition filed by a party to a pending cause, could issue a commission authorizing some person to take testimony in the form of depositions.

Deposition: sue a commission authorizing some person to take testimony in the form of depositions.

Subpoena Before Notice. In our courts such authority is purely statutory. The party desiring depositions may take them "conditionally." An officer taking depositions in a cause acts in a judicial capacity, and his authority is derived from the court in which the cause is pending; by conformity to the statute certain officials named in section 6387, Revised Statutes 1909, may become temporary substitutes for the court, and as such take testimony

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in the form of depositions. [Swink v. Anthony, 96 Mo. App. l. c. 424; Stirneman v. Smith, 100 Fed. l. c. 603; Ex parte McKee, 18 Mo. 599.] The statute is strictly construed. [Patterson v. Fagan, 38 Mo. 70; Ex parte Mallinkrodt, 20 Mo. 493.]

In depositions to be taken out of the State, before authority is given a commission is necessary, unless waived. In taking depositions of witnesses within the State no commission is necessary except under conditions mentioned in section 6390. But always, whether a commission issues or not, the notice is necessary before any of the officers named in section 6387 can take the testimony or enforce the attendance of witnesses, or perform any function in connection with the taking of depositions, such as issuing subpoenas.

A notary or justice of the peace has no power in the premises *until* the statute is complied with. It is the proper service of a proper notice of the time and place which vests the officer with authority to take testimony and to compel the attendance of witnesses by *issuing subpoenas*. [Secs. 6392, 6394-6, and 6404, R. S. 1909; Tiede v. Fuhr, 264 Mo. l. c. 628; In the Matter of Whicker, 187 Mo. App. l. c. 100.]

Under section 6404 the officer is authorized and required to take depositions "in pursuance of this article, or by virtue of any commission issuing out of any court of record," and "shall have power to issue subpoenas for witnesses to appear and testify, and to compel their attendance," etc. He must have authority either by the commission issued to him or "in pursuance of this article" to-wit, by the service of notice. The issuance of a commission in the one case gives him authority as the service of the notice does in the other. The service of the notice is the summary method of vesting authority in the certain officers named in the statute to perform the functions of the court, otherwise a special commission would be required.

At the time the attachment was served in this case the officer had the benefit of two subpoenas, one of them

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issued November 13th and served a minute before the arrest. It is not claimed that disobedience of that subpoena was sufficient to authorize the arrest because it had not been served when the attachment was *issued*. The other subpoena was served on the 11th, but at the *same time that the notice was served*. It was issued *before* the notice was served and consequently at a time when the notary had no authority to issue it.

In the Tiede case, *supra*, the notice was void because it gave an impossible date, and the court in holding void the subpoena afterward issued, said: "In such case in the absence of authority [by service of notice] to take depositions there can be no power to *subpoena* and attach witnesses whose depositions are desired."

In the Whicker case, *supra*, the notice was served on the wrong party, and the Kansas City Court of Appeals said (187 Mo. App. l. c. 101): "The notary was without authority to take depositions, and consequently was without authority to *subpoena* Whicker."

The respondent apparently conceded that the notary was without power to take evidence and issue an attachment before the notice was served, but seemed to think he could *issue a subpoena* and that it would be good if it were merely *served* after the notice. He sent the notice and subpoena along together, with a person not an officer, and that person after serving the notice at the same time served the subpoena. The subpoena was unauthorized when issued, and the subsequent service of the notice could not give it validity. It is the same condition as a summons issued in a case before the petition is filed, it is void process. [Hust v. Conn. 12 Ind. 257; Gearhart v. Olmstead, 37 Ky. 441.] Void process is defined to be such as was issued without power in the court to award it, or which the court has not acquired jurisdiction to issue in the particular case. [Bryan v. Congdon, 86 Fed. 221.]

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IV. An action for false imprisonment will not lie against an officer who makes an arrest upon a writ, regular and fair on its face and issued by a court having jurisdiction. [Emery v. Hapgood, **False Arrest.** 66 Am. Dec. 459; Wehmeyer v. Mulvihill, 150 Mo. App. l. c. 205.] But the formal regularity of the writ does not protect the person who causes it issuance. When a private person causes a writ to be issued for the arrest of another he is bound to see that the record of the court which issues it furnishes authority for the writ. [Tiede v. Fuhr, 264 Mo. l. c. 629; McCaskey v. Garrett, 91 Mo. App. 354; Boeger v. Langenberg, 97 Mo. 390.]

V. Whether or not the suit of Boyles v. Burnett was filed on the 11th or 12th of November is a question of fact which may or may not be necessary to nonsuit. settle in another trial. If nothing further is shown regarding the issuance of the subpoena than indicated above it will not be necessary. However, it was error to nonsuit the plaintiff on the evidence introduced, instead of submitting that issue to the jury.

VI. The notice naming Kansas City instead of Independence as the place where the suit was pending, on the authority of the Tiede case, did not authorize the notary to enforce the attendance of witnesses.

Place of Suit Pending. In the Tiede case the witness knew there was a mistake in the notice, for she was served with a subpoena a few minutes afterwards which gave a correct date and proved the intention was to give her notice for taking of the depositions on the same date as the subpoena required her appearance. Nevertheless, such knowledge only went to mitigation of damages.

The mistake in this case in the notice to take depositions was in the place where the suit was pending. There was no suit pending in Kansas City, but there was a suit pending in Independence. Respondents claim that it is all one court and that the mistake is not a

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material one. Section 4031 provides that the terms of court in the Sixteenth Judicial Circuit shall be held at Independence on certain days and in Kansas City on certain other days, in the same way that the terms of court are provided in the different counties of a circuit having more than one county. By the Act of 1905, the Independence Division of the Sixteenth Judicial Circuit was created and a separate judge provided for that court. [Laws 1905, p. 121.] Cases are filed in Independence and cases are filed in Kansas City, each as a separate and distinct court. Notices of the pendency of a suit in one of those places would not be notice of the pendency of a suit in the other place. [Bowyer v. Knapp & Miller, 15 W. Va. 277.] Depositions taken on such a notice, the other party not appearing, could not be used in evidence. It is the same in principle as the Tiede case where the mistake in the notice to take depositions referred to the time at which they were to be taken, and in the present case it referred to the place where the suit was pending.

VII. It appears that when the notice to take depositions was served on the plaintiff herein he signed the printed acknowledgment usual in such notices to the effect that he acknowledged the service of notice, ~~Waiver.~~ waived the *issue of dedimus* and exceptions as to time, etc. Respondent claims that the plaintiff by signing this acknowledgment waived all irregularity, making the notice perfectly good and thereby gave the notary jurisdiction to take depositions. This waiver, however, has no more effect than its terms import. It can go no further than the acknowledgment of the service and the waiver of *dedimus*, etc., in the case mentioned in the notice to-wit, a case on the 11th day of November in Kansas City. It does not enter appearance, nor authorize the taking of depositions in a suit not filed, nor in a suit filed in a different place from the one mentioned. Notices of this kind and waivers are construed with some strictness and go no further than the letter of the stipulation contemplates. [Sey-

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mour v. Farrell, 51 Mo. 95.] A waiver of notice to take depositions would waive the right to question authority to take the deposition in the case named at the time and place, but such waiver would not confer validity on a void subpoena *issued before* the waiver. Subsequent appearances to notices of this character do not cure prior irregularities in a collateral proceeding to procure witnesses. [Oxford Iron Co. v. Quinchett, 44 Ala. 487; Howard v. Folger, 15 Me. 447.]

The judgment is reversed and the cause remanded.
Roy, C., concurs.

PER CURIAM:—The foregoing opinion of WHITE, C., is adopted as the opinion of the court. All of the judges concur.

CITY OF ST. LOUIS v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY et al.; NATIONAL LEAD COMPANY, Appellant.

Division Two, July 27, 1917.

1. **APPELLATE PRACTICE: Weight of Evidence: Value of Property Taken.** In a condemnation proceeding, where substantial evidence of the value of the property taken was offered by both sides, the appellate court is powerless to weigh the evidence and say that the amount of damage found by the trial court sitting as a jury, who made a special finding of facts, was inadequate.
2. **CONDEMNATION: Measure of Damage: Compensation.** The Constitution and statutes contemplate that the owner of private property taken for public use must be fully compensated therefor. They do not contemplate speculation, but they do require that he be made whole.
3. **—: —: Accuracy of Estimate.** Any estimate of the damage done to a whole factory plant by taking a parcel thereof is necessarily a guess. An absolute accurate valuation cannot be even approximated.

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4. _____: _____: Replacing Part Taken by Purchase of Other Land. Damage for land taken can be paid only in money; nor can the owner be compelled to exchange the part to be taken for other adjoining parcels which if utilized at purchasable prices would curtail or eliminate the damage. But where only a part of a factory plant is taken and it is claimed the taking of that part destroys the whole plant for its then uses and that the measure of damages is the value of the entire plant, it is competent for the condemnor to show, in diminution of the damage, that there is adjoining property, purchasable at a fair price, which, if utilized in connection with so much of the plant as is not taken, will result in as adequate and valuable a plant as the existing plant.
5. _____: _____: The Words "Or Damaged." The words "or damaged" placed in the Constitution of 1875 after the word "taken" broadened the field of consequential damages where there is no physical taking of the owner's property; but they do not have the effect of allowing to an owner whose property is actually taken any greater compensation than he could recover without those words, for both before they were placed in the Constitution and since the owner is entitled to be compensated for the value of the property taken and the amount of the damage to the property not taken. Consequently the rule announced in *Hannibal Bridge Co. v. Schaubacher*, 57 Mo. l. c. 588, decided prior to the adoption of the Constitution of 1875, is applicable.
6. _____: _____: Taking Part of Factory: Depreciation in Value of Whole. Where the taking of a part of a tract devoted to a special use results in a depreciation of the plant for that use, the measure of depreciation is the sum required to be expended in order to rehabilitate the property for such special use, if such rehabilitation is practicable; and in measuring the amount of depreciation to which the part damaged but not physically taken has been subjected, if no available property is owned by him whose part is taken, the price at which other adjacent land, equally as valuable intrinsically, as convenient, as economical in use and as accessible, and which can be bought and used in connection with the part not taken, may be shown.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Shields*, Judge.

AFFIRMED.

Boyle & Priest and T. E. Francis for appellant.

(1) Where property is taken for public use its value should be paid; when not taken, but only injured,

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its depreciation in value only should be allowed. *Railroad v. McGrew*, 104 Mo. 300; *Railroad v. George*, 145 Mo. 46; *Doyle v. Railroad*, 113 Mo. 288. (2) The value of buildings or other improvements located on land taken for public use should be included in the award of damages. *City v. Morse*, 105 Mo. 518. (3) Where two tracts of land, divided by a public street, are used for a single purpose, and one or part of one of such tracts is condemned and taken for public use, and the other tract is damaged or its market value is depreciated by such taking, damages should be awarded the owner therefor. 10 Am. & Eng. Ency. Law, 1166; *Bridge Co. v. Schaubacher*, 57 Mo. 582; *Railroad v. McGrew*, 104 Mo. 282; *Elevator Co. v. Railroad*, 135 Mo. 353; *Railroad v. Nercross*, 137 Mo. 415; *City v. Brown*, 155 Mo. 545; *Railroad v. Brick Co.*, 198 Mo. 698; *Drainage District v. Dawson*, 243 Ill. 175; *Railroad v. Drummond*, 205 Mo. 167; *Lough v. Railroad*, 116 Iowa, 31; *Shirley v. Railroad*, 121 Ky. 87. (4) In such a case, if the part taken is of greater value in connection with the whole than as a separate parcel, the measure of damages for the part taken is the fair cash value of the part taken considered as a part of the whole. *Railroad v. Humiston*, 208 Ill. 100. (5) Where property taken for public use has been improved for carrying on a special business, and such business enhances the value of the site, this should be considered in awarding damages to the owner. 10 Am. & Eng. Ency. Law, p. 1161; *Railroad v. Jacobs*, 110 Ill. 414; *Belting Co. v. Boston*, 183 Mass. 254; *Railroad v. Chicago*, 172 Ill. 198; *Railroad v. Chicago*, 100 Ill. 21; *King v. Railroad*, 20 N. W. (Minn.) 135; *Telegraph Co. v. Railroad*, 202 Mo. 688; *Railroad v. Brick Co.*, 198 Mo. 711. (6) While the owner of land taken for public use is required to minimize the damages by using his property in the most advantageous way, he is not required to invest large sums in the acquisition of other property to take the place of that condemned, in order to minimize the damages. *Railroad v. Brick Co.*, 198 Mo. 714; *Bridge Co. v. Schaubacher*, 57 Mo. 582; *Railroad v. McGrew*, 104 Mo. 299.

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Chas. H. Daves and H. A. Hamilton for respondent.

(1) The finding of the court stands as a special verdict and will not be disturbed where there is substantial evidence to support the same. *Leavitt v. Taylor*, 163 Mo. 170; *Walther v. Null*, 233 Mo. 110. (2) On a mere question of value depending on conflicting evidence, this court will not interfere with the findings of the commissioners and the circuit court. *St. Louis v. Brown*, 155 Mo. 567; *St. Louis v. Abeln*, 170 Mo. 324. (3) Where two tracts of land, divided by a public street, are used for a single purpose, and a part of one of the tracts is taken for public purposes, the owner is entitled to damages for the depreciation in the value of the other tract, but he must minimize the damages by adjusting himself to the changed condition. The possibility of obtaining other land in the neighborhood for the same purpose must be considered in estimating appellant's damage. *Bridge Co. v. Schau-bacher*, 57 Mo. 582; *Railroad v. McGrew*, 104 Mo. 282; *Elevator Co. v. Railroad*, 135 Mo. 353; *St. Louis v. Brown*, 155 Mo. 545; *Railroad v. Brick Co.*, 198 Mo. 698; *Railway Co. v. Switzer*, 117 Ill. 399; *Railway Co. v. Brugger*, 24 Tex. Civ. App. 367; *Sutherland on Damages* (3 Ed.), sec. 1067, p. 3122; *Sedgwick on Damages* (8 Ed.), sec. 1172, p. 437.

FARIS, J.—This action was commenced by the city of St. Louis for the purpose of condemning the property of appellant, the National Lead Company, and others, as a right-of-way for the western approach to a bridge across the Mississippi River, called locally the Municipal or Free Bridge. The commissioners appointed by the court awarded to appellant for the land taken and for consequential damages the sum of \$67,100. Exceptions were promptly filed by appellant and upon a trial by the court sitting as a jury, the court found for appellant exactly the amount of damages which had been given to it by the commissioners. Thereupon appellant took and perfected this appeal.

The appellant is engaged in the city of St. Louis in the manufacture of white lead, and for the purpose of

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carrying on this business it has constructed an extensive plant at First and Lombard Streets. The factory of appellant is located upon two separate parcels of land, called in the record the "north tract" and the "south tract," which are separated from each other by said Lombard Street. Appellant had improved both parcels of land for the purpose of carrying on its business of manufacturing white lead, by erecting thereon factory buildings, warehouses and other structures, and by installing in such buildings the necessary accessories, machinery and appliances for its trade.

The evidence discloses that in the manufacture of white lead it is necessary to devote a large amount of space to a process called in the nomenclature of the trade, "corroding" the lead. That part of appellant's plant situated south of Lombard Street (and called hereinafter for convenience the "south corroding yard") was used by appellant in the corroding process and upon it, as the proof shows, some 48 per cent of the lead processed in the factory was corroded. There was also a yard north of Lombard Street, and hereinafter referred to as the "north corroding yard," which was likewise devoted to similar purposes, and on which the remainder of the lead made by appellant was corroded. The south corroding yard, of which the city appropriated 17,800 square feet, contained in all 22,872 square feet; thus leaving, after the condemnation, only a wedge-shaped parcel containing 5072 square feet. The taking of the portion mentioned from the south corroding yard rendered the latter wholly useless for lead corroding purposes, and it is therefore strenuously contended that since, by the taking of the south yard 48 per cent of appellant's corroding area was destroyed, this fact so depreciated the value of appellant's factory as a lead factory as practically to destroy it. This, for the reason that upon the remaining corroding area it is impossible to operate the plant to its full capacity, and since it cannot be operated to its full capacity, the overhead expense renders it financially impossible to operate it at all. Upon this view appellant made below, and now makes here, two claims

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for damages: (a) That it is entitled to the actual damages sustained by reason of the physical taking of its south corroding yard, that is, of the tract located south of Lombard Street, and (b) that it is entitled to consequential damages by reason of its entire plant being depreciated in value as a result of the city's taking part of the south corroding yard, without which the plant cannot be operated successfully, or profitably.

Many witnesses were called both by the city and by appellant. The testimony of these witnesses, as to the value of the south corroding yard which was actually and physically taken, varied greatly; the values fixed by some of the witnesses thereon being two or three times greater than the value fixed by other witnesses in the case. Likewise the depreciation which appellant urges will accrue to its plant by the physical taking of 48 per cent of its corroding yard area was fixed at amounts which varied greatly. Some of the witnesses fixed this latter depreciation alone at two hundred and fifty thousand dollars; others said no depreciation would result, and others testified that depreciation in varying amounts would result, thus fixing the amount thereof from *nothing to a quarter of a million dollars.*

Against the second contention of appellant set out above, the city, while not seriously disputing that appellant's plant could not be operated profitably or successfully without the south corroding yard, urges nevertheless that the value of the plant was not depreciated because other parcels of land could have been procured by appellant to take the place of the south corroding yard condemned by the city, upon which the necessary corroding process could be carried on by appellant as conveniently and economically as theretofore on the yard condemned.

At the request of appellant the trial court made, pursuant to the statute in such behalf, separate findings of fact and conclusions of law. Among these findings of fact the court specifically considered the point in this case which is most strenuously urged upon our attention by appellant. Its findings upon this point and

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its conclusions of fact upon the controlling questions in the case are thus set out:

"That the city of St. Louis, plaintiff herein, has by an ordinance duly passed, authorized the appropriation of a strip of land 100 feet wide, for a right-of-way for its Municipal Bridge approach over that portion of said tract located south of Lombard Street and has under the authority of said ordinance condemned and appropriated for said bridge approach 17,800 square feet off of the northern portion of the tract lying south of Lombard Street, leaving a triangular strip containing 5072 square feet south of the part appropriated.

"That the taking of the 17,800 square feet south of Lombard Street depreciates the market value of the 5072 square feet south of the part taken, because it is left in a wedge-shape and separated from the remainder of defendant's property north of Lombard Street by the 100-feet-wide right-of-way for the bridge approach, appropriated under this proceeding, and by Lombard Street, a public highway.

"That the taking of the 17,800 feet south of Lombard Street does not depreciate the market value of the 60,000 feet north of Lombard Street, because it is shown from the evidence that for all marketable purposes this part is of sufficient size and is worth as much on the market without the part south of Lombard Street as it was worth when the same owner owned both parcels. The court further finds that immediately west of and contiguous to the part north of Lombard Street there is and was for sale when the commissioners' report was filed in this case, and when the money was paid into court for the use of exceptor herein, 21,000 square feet of land which could be acquired for about \$50,000, and which was just as available for use in connection with the part remaining as the part appropriated.

"That if the defendant wished to continue to use the part remaining north of Lombard Street, for a lead manufacturing plant, it could by a re-arrangement of it in connection with the 21,000 square feet, use it to just as good advantage and as economically as it could be

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used before the appropriation of the part south of Lombard Street, and that it would be just as valuable in its rearranged and readjusted condition as it was before the appropriation by the city of the part south of Lombard Street. The court therefore finds that the just compensation to which exceptor is entitled is the market value of the 17,800 square feet taken, the depreciation in the market value of the 5072 south of the part taken, the cost of rearrangement to suit the new conditions, and the depreciation in value of the 60,000 feet north of Lombard Street in its rearranged condition; all of which the court finds to be \$67,100."

To these findings of fact the trial court appended certain conclusions of law, only a part of which we need here consider. These conclusions of law will be found set out by us in pertinent fullness in our discussion of the case, and we need not here occupy space with them.

We have set forth above the two contentions made by appellant, as also the counter-contention made by the city touching the measure of damages for the alleged depreciation to appellant's plant. As to the law by which the court below was governed in fixing the value of the south corroding yard, most of which was actually taken, there is no dispute between the city and appellant, but touching the facts found by the court thereon, that is, the value fixed by the court to the parcel taken, there is dispute. These questions therefore, one of fact and one of law, are the only two which we will find it necessary to refer to in our opinion.

I. We are urged to revise the finding of the learned court *nisi* upon the question of the award of damages for the value of the parcel actually taken. The case was tried before the court sitting as a jury; there was

**Weight
of
Evidence.** substantial evidence of value offered upon both sides; the point of value being hotly contested. The learned trial court made a

special finding of facts, by which he fixed the value of the parcel of land at \$67,100. There was substantial evidence to support this finding and in such a situation we are as an appellate court powerless to

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weigh the evidence in a law case such as this is. [Woods v. Johnson, 264 Mo. l. c. 293; Hatton v. St. Louis, 264 Mo. 634; Walther v. Null, 233 Mo. 104; Leavitt v. Taylor, 163 Mo. 158.]

II. As nearly as we are able to gather from the briefs furnished us, the appellant complains of that part of the conclusions of law of the court below which reads thus:

"The preponderance of the evidence in the case, I think, shows that if this 'Wulffing-Fries-Bird' property had been acquired by the exceptor, it could have been used in connection with their plant which was left, as economically as the old yards could have been used. And the preponderance of the evidence ^{Measure of Damages.} shows that the new yards could have been built on this property for sixteen thousand dollars, and then the exceptor would have had a much better plant, because it would have been new and up-to-date, whereas the corroding sheds or pens on the south lot were old and had depreciated fifty per cent; in other words, the exceptor would have been made whole. But the exceptor contends vehemently that evidence of property to be acquired cannot be considered, because, First: The law does not contemplate an exchange of property; second, that the exceptor is only required in order to minimize the damages to use that property which he owns at the time and is not required to purchase other property.

"It is true that the city could not enforce an exchange of lands upon the exceptor. It is also true that the city cannot require the exceptor to purchase other property to take the place of that which has been condemned, nor could the city pay exceptor anything but cash. But that is not the object of the testimony, as is stated in the case of Railroad v. Switzer, 117 Ill. 399, above quoted; the Supreme Court says, page 402: 'It obviously should have been permitted the petitioner to show there would be other sources of water supply—not, as is supposed by appellee's counsel, for the purpose of

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showing there would be no damages, but for the purpose of affecting the amount of damage, the amount of the estimates of damages by appellee's witnesses having been based on the supposition that there would be no other means of supplying the mill with water.'

"So in the case of G. C. & S. F. Ry. Co. v. Brugger, 24 Tex. App. 367, quoted above, wherein the court said, page 369: 'It is clear to us that the proximity and the price of adjacent or contiguous timber land of a similar character was a fact proper to be considered by the jury in determining the extent to which appellee's lands would be depreciated by the loss of this particular tract.'

"On page 370 the court says: 'It is plain that if appellee's environment as to timber lands was such that he would be able to supply the loss of his timber, or lessen the loss and inconvenience occasioned by parting with what he had, it was proper to show the fact, and the cost to which he would be put in so doing, not as a distinct item of damage, but to be considered in determining to what extent the value of his land would be affected by the condemnation.'

"To the same effect see Sedgwick on Damages, (3 Ed.) sec. 1172, page 437, which says: 'When the land has a value for a particular purpose, the possibility of obtaining other land in the neighborhood for the same purpose must enter into and affect the market value, and hence evidence bearing on this could hardly be excluded.'

"It was also claimed by the exceptor that the new corroding sheds could not be built on the Wulffing-Fries-Bird lot, because of the fire ordinance which was introduced in evidence, but the evidence showed that cement construction could be used to comply with this fire ordinance and within the \$16,000 estimated as the costs of the new corroding sheds.

"This whole subject was before the commissioners, and the evidence in regard to the Wulffing-Fries-Bird lot was before them, and they must be presumed to have

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considered it as an element (in diminution?) of damage, and I think under the authorities they had a right to do so."

Imprimis, we are forced to bottom any consideration of a case growing out of the exercise of the right of eminent domain upon the premise that such cases are necessarily *sui generis*. This is so because both the Constitution and our statutes contemplate that the owner of private property taken for public use must be fully compensated therefor. It does not contemplate speculation, but only compensation; yet the owner must be made whole. And while it is conceded in the instant case by plaintiff city that the situation presented is one wherein the appellant's entire plant must be considered as if it were a single parcel, whereof a part having been condemned, the whole is thereby depreciated and damaged, it is yet manifest that any estimate of the damage done by taking this parcel from the whole is necessarily a guess. Indeed the testimony of the witnesses discloses this in no uncertain way, for their estimates of the damage done in the behalf mentioned supra, varied from nothing to a quarter of a million dollars; that is to say, some of the witnesses said there would be no depreciation whatever in the value of the whole property by reason of taking the parcel south of Lombard Street, while others placed such resulting depreciation alone at \$250,000.

Nothing is clearer than that courts cannot even approximate the dealing out of even-handed justice upon such testimony as this. We are not saying that it was false, or dishonest testimony; it was merely expert testimony. In the face of this situation, we cannot see in what other way the learned court *nisi* could have reached any sensible conclusion except by reference to something concrete as a basis. What was done thereupon was substantially this: (a) The value of the ground actually taken was shown by the witnesses (and ultimately as we have seen above found by the court); (b) then there was shown the value of

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the improvements thereon, and this value was added to the bare ground value so found as above; (c) it was then considered by the court how much the taking of the south corroding yard had depreciated the value of the factory as a going concern, and (d) the proof showing that for \$51,000 an equally commodious, convenient, economical and accessible parcel for a new corroding yard could be gotten and was for sale on the market, the trial court considered this fact as the measure of damages from depreciation of the whole plant.

In the *locus a non lucendo* character of the expert testimony presented upon the question of depreciation, what other course was open to the trial court? There is no doubt but that appellant was entitled to compensation for damages done to the whole of its factory as a lead factory. If this lead factory was worth less after the parcel constituting one of its theretofore corroding yards was condemned and taken, appellant is entitled to receive such full depreciation in cash. The whole difficulty is in ascertaining the amount of such depreciation. The case stood as if appellant had complained (as some of its witnesses did for it) that inasmuch as 48 per cent of its corroding yard area was taken, its factory for that became inoperable and worthless, and thereupon plaintiff had replied: Your complaint of 100 per cent depreciation is wholly untenable because you can now buy a parcel of land for \$51,000 which will in every respect replace as a corroding yard that which we have taken. Were then the conclusions of law of the court warranted? We think they were as constituting a rational criterion by which to measure the alleged depreciation of land devoted to a special purpose.

It is conceded of course that damages for land taken through the exercise of the power of eminent domain may not be paid in anything but money; that neither other parcels of land nor the soil thereof are current media of payment therefor, and that the owner of land may not be compelled to swap lands or to move

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into another town, or city, or state where the land is cheap and have such cheapness compared as a criterion of value against the lands taken. But when land is devoted to a special use and it is urged that such use has been wholly or partially destroyed by the taking of a parcel of such land, it will be appreciated that some concrete criterion by which to measure the quantum of damage sustained is absolutely necessary; otherwise the amount of the depreciation would be a mere matter of bald guessing.

The cases and authorities cited and commented on by the learned trial court bear out this view, we think. The case of Hannibal Bridge Co. v. Schaubacher, 57 Mo. l. c. 588, is in principle, likewise an authority for this view. For while in that case this court seems to have held in mind the duty of minimization of damages accruing in addition to the point here vexing us, the measure of damages there applied was in the last analysis the identical one here urged on us by the plaintiff. In the above case Schaubacher had a brewery, built on two lots which were (as here by a public street) separated from each other by a public alley. On the lot condemned were situate his pump, malt mill and power plant, with piping therefrom crossing the alley to the main plant, and (as here) absent and lacking all of which the brewery could not be operated successfully. There (as here) therefore it was urgently contended that the taking of the lot on which the above-named necessary accessories were located absolutely destroyed the brewery, and the latter was damaged to its full value. But this court said:

“After the appropriation of the land on the east side of the alley, on which the malt house, horse power, pump and pipe were situated, the brewery, which the evidence shows was very valuable, was rendered worthless. The amount of damages then would have been nearly equivalent to the whole value of the brewery. But if these fixtures and appliances could have been transferred to the western side of the alley and placed in such a situation that the brewery could have been

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just as effectively operated as it was before, then the actual loss to defendants would have been the trouble and expense of making the removal. This then, we are inclined to think, would be the proper and appropriate measure of damages, viz: the cost and expense of removing the malt house, horse power, pump and pipe to the west side of the alley, so that they could be used as effectively and advantageously for running the brewery as it was run before, to which should be added compensation for the use of the brewery for what time it would have been necessarily idle, whilst the change and transfer were being made."

It was conceded by learned counsel for appellant in his argument *nisi* that the Schaubacher case is in point, and against him. But he argued substantially that since the Schaubacher case was decided our constitutional provision upon the point has been changed by adding to the word "*taken*" the words "*or damaged*." The fact stated is correct, but the addition of the words "*or damaged*" did not, by the great weight of authority every where, have the effect of changing the meaning of the constitutional provision in the remotest way, so far as concerns the specific and *instant question* of consequential damages arising from an actual taking by the exercise of eminent domain.

If private property be damaged by a public use in connection with an actual taking by the exercise of eminent domain, it is as effectually "*taken*" (4 Sutherland on Damages, 3948) as if it were blown into thin air and scattered by the four winds. That the change in the wording of our Constitution has broadened the field of consequential damages arising in cases wholly disassociated with an actual physical taking by the exercise of the right of eminent domain, there is no question. But the Schaubacher case itself recognizes the rule that upon an actual taking of private property for public use by the exercise of eminent domain the owner is entitled to full compensation for all damages incident to the taking of his property. For upon this point it was said in that case, at page 585:

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"The statute requires the commissioners 'to assess the damages which the owner of the land may sustain by reason of such appropriation.' This by no means confines the assessment to the land actually taken. That may constitute the smallest amount of the injury done. There may be consequential damages which result by reason of the appropriation fairly comprehended within the scope of the law, and this case furnishes a strong illustration. Such is the construction placed upon similar statutes in other states."

Therefore we think it plain that the addition of the words "or damaged" to our constitutional provision has in no wise changed the rule applicable in a case like this wherein there has been an actual taking of one parcel whereby another parcel or the whole property has been affected by a resulting depreciation. Likewise, in cases in principle similar wholly to this it is said by Mr. Sutherland in his excellent treatise on the law of damages, that "where part of a tract of land is taken or damaged and its severance and the public use of it necessitates any new expenditure to protect or maintain the ordinary use of the residue such expenditures or the necessity therefor is an element of damage. The owner has a right to recover the amount so expended or required to be expended on the ground that the value of his premises is diminished accordingly. Thus, the necessity of maintaining fences along the line of a railroad or highway is a recognized item of damage." [4 Sutherland on Damages, sec. 1072.]

The rule of course should be limited to cases wherein only part of a tract devoted to a special use is appropriated. It can have no relevancy to a case wherein the whole of the parcel is taken. For, we repeat, in no case can the owner, for the convenience of the condemner, be required to swap lands, or to go into the market and buy other lands in lieu of those taken. But in a case where the taking of a part of a tract which is devoted to a special use results in large depreciation in value for that special use, the measure of that depreciation ought to be the sum required to be expended

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in order to rehabilitate the property for such use, or replace the plant *in statu quo ante capiendum*; provided of course that rehabilitation in such manner be practicable. Otherwise, one whose fences had been taken from about his farm could refuse to build others and his farm being thus rendered useless as a farm, exact as damages the full value thereof; or one whose mill-pond was taken could demand the full value of his mill thus rendered useless for lack of water; or one whose mine or oil well was temporarily destroyed by condemning the tract on which the shaft or well or pump stood could demand full value of such mine or oil well. In such case if a new fence, or pond, or shaft or well can be made on the land of the owner the cost of erecting the same or of making the change to reproduce the *status quo*, ought to be the measure of damages. In cases where no available property is owned by him whose land is taken, the price at which other lands adjacent, equally as *valuable intrinsically*, as convenient, as economical in use, and as accessible, and which can be bought, may be shown as measuring the amount of depreciation to which the lands damaged but not physically taken have been subjected.

A situation wherein any other view is unthinkable is possible. For if the appellant's lead factory had been worth a million dollars and the parcel actually taken had been itself of little value and had contained an accessory of small intrinsic worth but one without which the million-dollar plant would have been rendered useless, the principle would be exactly the same. But even if appellant in the supposed case itself possessed no other land, would it be contended that the city could be saddled with the entire value of the plant as damages, when other lands in every way as available could be bought to reduce the damages? We think not, and conclude that in so far as the learned trial court considered the price at which other lands equally as available and usable by appellant could have been obtained, as the *measure of damages of the depreciation in value of the*

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whole plant by reason of the taking of the corroding yard, he was right and we rule this specific point against appellant.

It follows that the judgment below should be affirmed. Let this be done. All concur.

WALTER ROSS, Appellant, v. FIRST PRESBYTERIAN CHURCH OF STOCKTON, OMER WASSON and WALLACE WASSON.

Division Two, August 28, 1917.

1. **HEIRSHIP: Illegitimate Child.** The right of a plaintiff to claim title to land as the heir of the testator, who by will gave a life estate to his wife, is precluded by testator's death on February 15, 1860, and the birth of plaintiff to said widow on May 31, 1861.
2. **—: —: Heir of Mother.** A child of the testator's widow who took no steps to enlarge the life estate given her by the will into a fee in one-half the land as authorized by statute, cannot claim title in the land as heir at law of such widow.
3. **WIDOW'S ELECTION: Acquiescence in Will: Limitations.** In the absence of evidence to the contrary, it must be presumed that the widow, who probated her husband's will and qualified thereunder as executrix, and which gave her a life estate in all his lands, elected to take under the will; and being thus seized, she could not deal with the property in such a manner as to start the Statute of Limitations running adversely to the rights of the remaindermen.
4. **CONVEYANCE BY LIFE TENANT.** A deed by the life tenant conveys to the grantee no such title as will enable him to successfully assert an interest in the land after the life tenant's death. The life tenant's interest terminated upon her death, and cannot be enlarged by her conveyance.
5. **—: Limitations.** Whatever may have been the character of the holding of the land by the grantee of the life tenant, he cannot claim title by limitations, or defeat the rights of remainder-

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men, if sufficient time has not elapsed since the life tenant's death to sustain a claim under the Statute of Limitations.

6. **APPEAL: Rulings Limited to Adjudication of Appellant's Claims.** On appeal the rulings must be limited to the errors of which appellant complains. So that where plaintiff, who claims, first, as heir of the testator, second, as heir of testator's widow, and, third, as grantee of the life tenant, is the only appellant, the court cannot review the adverse claims of the defendants, who filed cross-bills, and to whom the court adjudged the land in controversy in equal moieties.

Appeal from Cedar Circuit Court.—*Hon. C. H. Skinker,*
Judge.

AFFIRMED.

Faulke & Brown and John B. Cole for appellant.

(1) The will of Hugh Ross is an instrument inoperative and void as to passing any interest in the real estate in controversy to the defendant claimant, the First Presbyterian Church of Stockton. (a) The will of Hugh F. Ross bears date February 10, 1860, and was admitted to probate March 31, 1860. The First Presbyterian Church of Stockton was not created or in existence, until November 20, 1903, that is, it was not in legal existence until about forty-four years after the will was executed. *Douthitt v. Stinson*, 63 Mo. 268. (b) The defendant church could not acquire title from a parent incorporated body because at the date Hugh F. Ross died the Missouri Constitution of 1820 was in force and thereby it was provided "that no religious corporation can ever be established in this State." *Proctor v. Board of Trustees*, 225 Mo. 52; Constitution 1820, art. 13, sec. 5. (c) Because the grant was not to any person, or persons, association or committee then existing or in being definitely pointed out or designated. *Board of Trustees v. May*, 201 Mo. 360; *Wells v. Fuchs*, 226 Mo. 106. (2) The will of Hugh Ross either vested in the "Old School" Presbyterian Church at Stockton, Missouri, the whole remainder

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in his 560 acres of land in controversy, or his will became wholly invalid and inoperative as to such remainder. Courts cannot make wills for deceased persons. Lockridge v. Mace, 109 Mo. 162; Sevier v. Woodson, 205 Mo. 202; Board of Trustees v. May, 201 Mo. 360, 264 Mo. 533; Hadley v. Forsee, 203 Mo. 418. (3) The plaintiff, not having been provided for in his father's will, although born after his father's death, was entitled to inherit notwithstanding the will. 1 R. S. 1855, p. 660, sec. 2; G. S. 1865, chap. 129, sec. 2; R. S. 1879, sec. 2162; R. S. 1889, chap. 51, sec. 4466; R. S. 1909, art. 5, sec. 333. Defendants having imputed to the mother of the plaintiff the character of a woman bad for virtue and chastity, plaintiff offered to prove that his mother's general reputation for virtue and chastity, from the time of Hugh Ross's death until she died was good, by witnesses present in court, which offer the court excluded. "The law presumes that every woman is chaste, until the contrary appears." State v. Kelley, 191 Mo. 691. Where immoral or illegal acts are sought to be imputed in any civil or criminal proceeding to a party and the conduct of such party in the respect impugned or sought to be impugned becomes a matter for judicial consideration, then, and in every such case, the general reputation of the parties so assailed is competent toward rebutting the commission of the imputed offense. Greenleaf on Evidence (14 Ed.), p. 82, sec. 54; Gutzwiller v. Lackman, 23 Mo. 168; Rogers v. Troost, 51 Mo. 470. (4) The trial court overlooked, or ignored the pleadings and the evidence as to the actual, open, notorious, continuous, exclusive and adverse possession of the plaintiff in the claim of ownership for more than 30 years. R. S. 1909, sec. 1879; R. S. 1909, sec. 1882.

S. E. Osborne, W. R. Hawkins and Mann, Todd & Mann for respondent First Presbyterian Church of Stockton, Missouri.

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(1) The will is not inoperative and void, and the bequest of the proceeds of the sale of the land to be devoted to the building of a house of worship at Stockton, Missouri, for the benefit of the Old School Presbyterian Church is valid, because: (a) It is a devise to a public charity. 3 Pomeroy's Equity (3 Ed.), sec. 1021; Schmidt v. Hess, 60 Mo. 591; Hadley v. Forsee, 203 Mo. 418; Russell v. Allen, 107 U. S. 163; 6 Cyc. 913; Attorney-General v. Briggs, 42 N. E. 118; Attorney-General v. Trinity Church, 91 Mass. 422. (b) A charitable gift will not be permitted by a court of equity to fail because of the non-incorporation of the society to whom or for whose benefit the conveyance was made, or for the lack of trustee. The power of the courts of equity to administer such trusts belongs to its general jurisdiction as a court of chancery, and is not derived from the statutes of Elizabeth. The fact that there was no organized or incorporated church at Stockton in 1860 when the will was made does not invalidate the bequest. Buckley v. Monk, 187 S. W. 31; Missouri Historical Society v. Academy of Science, 94 Mo. 459; Schmidt v. Hess, 60 Mo. 391; Chambers v. St. Louis, 29 Mo. 453; Russell v. Allen, 107 U. S. 163; 2 Perry on Trusts (3 Ed.), sec. 687-700; 6 Cyc. 914. (c) Public uncertainty as to the individual to whom the benefit reaches does not defeat the gift, but on the contrary is one of the features that distinguishes a public from a private charity. And the courts will enforce it if the donee sufficiently shows his intention to create a charity and indicates its general nature and purpose, and described in general terms the classes of the beneficiary. 3 Pomeroy's Equity (3 Ed.), sec. 1025; 6 Cyc. 936; 40 Cyc. 1469-1471. (d) Gifts to charitable uses have always received favorable consideration by the courts. Chambers v. St. Louis, 29 Mo. 543; Academy of the Visitation v. Clemens, 50 Mo. 167; Schmidt v. Hess, 60 Mo. 591; Howe v. Wilson, 91 Mo. 45; Missouri Historical Society v. Academy of Science, 94 Mo. 459; Powell v. Hatch, 100 Mo. 592; Barclay v.

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Donnell, 122 Mo. 561; Sappington v. Trustees, 123 Mo. 32; Lackland v. Walker, 151 Mo. 210; Hadley v. Forsee, 203 Mo. 418. (e) A bequest for charitable uses is valid even though there be no trustee appointed to carry it into effect. The court of equity will either appoint a trustee or execute the trust itself. 1 Perry on Trusts, sec. 249; Mormon Church v. United States, 157 U. S. 57; 3 Pomeroy's Equity (3 Ed.), sec. 1026; In re John's Estate, 36 L. R. A. 242. (f) The contention of appellant that the defendant church could not acquire title from a parent incorporated body because at the date of the death of Hugh F. Ross, the Constitution of 1820 was in force, which provided that no religious corporation can ever be established in this State, has no force and effect here. (1st) Because the defendant church has not acquired title and is not seeking to acquire title to the 560 acres of land in controversy. The bequest to it by the will of Hugh F. Ross was not of the land. The bequest was that the land be sold and the proceeds used to build a house of worship for the benefit of the Old School Presbyterian Church at Stockton. Such property, to-wit, houses of worship, churches have always had the right under any and all constitutions of the State to hold. (2nd) The parent church was never incorporated. Its trustees were, in 1899. The incorporation of the trustees of the General Assembly is not the incorporation of the church itself. Trustees of the General Assembly v. Guthrie, 6 L. R. A. 321. (3rd) Because the appellant Walter Ross having no right, title, interest or estate whatever in the land in controversy, can raise no such question by this appeal. Having no interest himself, he cannot question the validity of the will as to the church. Barkley v. Donnelley, 112 Mo. 570; Wheeler v. Land Co., 193 Mo. 291; In re McGraw, 2 L. R. A. 387, 136 U. S. 152; McKeorm v. Officer, 127 N. Y. 687; Patton v. Patton, 39 Ohio St. 500. (4th) The church did not lose its existence or organization by incorporating. It still has an association capable of appropriat-

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ing and using and enjoying the house of worship when it is built from the proceeds of the sale of the land in controversy. Catholic Church v. Tobbien, 82 Mo. 424; Lilley v. Tobbien, 103 Mo. 488. (g) The church did not take under the will then and there; that is, upon the death of Hugh Ross, as asserted by appellant. The trust created was an active trust, the trustees to be appointed by the court under its equity power being charged with the sale of the property, the building of the church or the turning over of the proceeds of the sale to the proper officers of the church for that purpose. The Statute of Uses does not apply to an active trust. Webb v. Hayden, 166 Mo. 39; Garland v. Smith, 164 Mo. 1; Simpson v. Erisner, 155 Mo. 157; Newton v. Rabenack, 90 App. 651; Carter v. Long, 181 Mo. 701. (h) The direction in the will that the land be sold and the proceeds used to build a house of worship in Stockton for the benefit of the Old School Presbyterian Church was a request of the proceeds of the sale of the land and not of the land to the church. Sanitarium v. McCune, 112 Mo. App. 332; Shepherd v. Clark, 38 Ill. App. 66; Methodist Church v. Smith, 56 Md. 362.

Parks & Son for respondents, Omer Wasson and Wallace Wasson.

(1) Under our law, a legitimate child is one who is born in lawful wedlock, or of a widow within ten months after the death of her husband, or who is born before the marriage of its parents, who afterwards marry and the child then receives the recognition of its parents. Gates v. Seibert, 157 Mo. 272; Martin v. Martin, 250 Mo. 545. A bastard at common law is one, not only begotten but born out of lawful wedlock, or not within a competent time after its determination, etc. 3 Am. & Eng. Ency. Law, 872. The general reputation and common report of the neighborhood is generally held to be admissible in questions of legitimacy. 5 Cyc.

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630 (3). Evidence of the resemblance of the child to the putative father, has been held competent. 5 Cyc. 630 (4). (2) Mere possession does not create title by limitation, however long continued; to have such effect, the possession must be open, notorious, continuous, and adverse and hostile to the true owner, under color of adverse title, or under a claim of ownership, hostile to the true owner. *Crowl v. Crowl*, 195 Mo. 338. The presumption is that every possession is rightful, consistent with and not in opposition to or adverse to, the true title and ownership; and one who relies on adverse possession must offer sufficient proof to rebut this presumption. *Hecksecker v. Cooper*, 203 Mo. 278. A possession friendly in its inception begun in subordination to the true title, does not change into a hostile one by a mere change of mental attitude but continues friendly, unless, by open and unequivocal acts, equivalent to ouster or disseizement, and sufficient to bring home notice to the true owner, it has been changed into one adverse and hostile to him. *McCune v. Goodwillie*, 204 Mo. 306; *Mo. L. & L. Co. v. Jewell*, 200 Mo. 707; *Williamson v. Brown*, 195 Mo. 313; *Coberly v. Coberly*, 189 Mo. 1; *Handlan v. McMann*, 100 Mo. 124; *Wilson v. Lerche*, 90 Mo. 473; *Pitzman v. Boyce*, 111 Mo. 387. Grantees of life tenants can no more contest the remaindermen's title by adverse possession than could life tenants themselves. Their possession, if adverse to an outstanding title, inures to the benefit of the remaindermen. *Charles v. Pickens*, 214 Mo. 212. When a party is in possession of property in priority with the rightful owner, nothing short of an open and explicit disavowal and disclaimer of a holding under that title, and assertion of title in himself, brought home to the owner, will satisfy the law, or lay a foundation for the operation of the Statute of Limitations. *Gordon v. Evans*, 97 Mo. 587. Adverse possession cannot run against the remaindermen, during the lifetime of the tenant for life. *Swearingen v. Stafford*, 188 S. W. 98; *Roberts v. Thomasson*, 174 Mo. 378; *Meddis v. Kenny*, 176 Mo. 200; *Brown v. Moore*,

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74 Mo. 633; Moran v. Stewart, 246 Mo. 462; Shoultz v. Lee, 260 Mo. 719. The possession of the life tenant is not adverse to the remaindermen. McThurston v. Farley, 194 Mo. 502. The Statute of Limitations does not begin to run against reversioner until the death of the life tenant. Reed v. Lowe, 163 Mo. 579; Linville v. Greer, 165 Mo. 380; Hall v. French, 165 Mo. 430; Westmeyer v. Gallenkamp, 154 Mo. 28; Rothwell v. Jamison, 147 Mo. 601; Carey v. West, 139 Mo. 185; Roberts v. Nelson, 87 Mo. 229; Dyer v. Brannock, 66 Mo. 391; Bradley v. Ry. Co., 91 Mo. 493. Where land is in possession and occupancy of one who holds it by reason of his purchase from widow, the Statute of Limitations does not begin to run in his favor as against the owner of the title until dower is assigned or the widow dies. Osborn v. Welden, 146 Mo. 185.

WALKER, P. J.—This suit was commenced in the circuit court of Cedar County under the provisions of Section 2535, Revised Statutes 1909, to ascertain and determine title to the land described in the petition. The defendant the Presbyterian Church of Stockton answered denying that the plaintiff or its co-defendants, the Wassons, had any interest in the land, and by cross petition alleged that under the will of one Hugh F. Ross it became the residuary legatee of said Ross and prayed that the court appoint a special trustee or master in chancery to sell the land and pay over the proceeds to the trustee of said church.

The plaintiff answered this cross petition, alleging that the defendant Church took nothing by reason of or under the will of said Hugh F. Ross and that plaintiff was the owner in fee of the land and prayed the court to so adjudge.

The defendants Wasson answered denying that either the plaintiff or the Church had any interest in the land, and filed a cross petition setting up that they were the owners in fee of the land as the heirs of Hugh F. Ross and prayed the court to so adjudge.

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Plaintiff answered the defendants Wassons' cross-bill, denying that they had any title to or interest in the land in question as the heirs of said Hugh F. Ross or otherwise, and alleged title in fee in the plaintiff.

The defendants Wasson denied the allegations in plaintiff's answer. The issues being made up upon the cross petitions of the respective defendants and the plaintiff's answer thereto and the reply to such answer, plaintiff dismissed as to his petition and the cause went to trial on the issues thus made.

On the application of the plaintiff a change of venue was awarded to the circuit court of Polk County, resulting upon a finding for the defendants.

The controversy involved: (1) the construction of the will of Hugh F. Ross, (2) the legitimacy of Walter Ross as a son of Hugh F. Ross, and (3) the application of the Statute of Limitations.

Hugh F. Ross is the common source of title. He died testate in February, 1860, seized of the land in controversy, which consisted of about 500 acres on Sac River. He left surviving him a widow but no issue. Two children born of this marriage had died in infancy. The clause of Hugh F. Ross's will upon which the controversy herein is based is as follows:

"That is to say, first, after all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give, bequeath and dispose of as follows, to-wit: To my well beloved wife, Caroline Ross, the following described tract or parcel of land, to-wit [here the land in controversy is described as in plaintiff's petition], containing five hundred and forty acres. Said tract or parcel of land being the farm on which I now reside, known as the Ross farm, to have and to hold the same together with all the rents, profits and advantages of the same during her natural lifetime; and after her death to be sold and the proceeds thereof to be applied to the erection of a house of worship in the town of Stockton, for the use and benefit of the Old School Presbyterian Church."

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After the death of Hugh F. Ross his wife continued to live on the land, and about May 31, 1861, gave birth to the plaintiff. Six years after the death of Hugh F. Ross his widow married one John F. Kennedy. Plaintiff lived on the land with his mother and step-father until 1877, when, upon his marriage, he took possession of about one-half of the land and cultivated same, and in 1888 erected a dwelling thereon which he and his wife continued to occupy and were in possession of at the trial of this cause in June, 1912.

In March, 1900, his mother and her husband made and delivered to him a warranty deed to all of the land in controversy. Thereafter he made many permanent and valuable improvements thereon and continued to occupy and use the land, exercising all the rights of ownership thereto. The mother of plaintiff died in March, 1910. At the time of her death there was no Presbyterian church in the town of Stockton. The incorporation of a church organization of that faith was effected at Stockton on the 22nd day of March, 1904. The membership at and since that time has been small, no church edifice has been erected and the meetings have been irregular. There is no showing that prior to 1910 any organization styling itself the "Old School Presbyterian Church of Stockton" sent any representatives to a meeting of the Presbytery of that district. No formal steps have ever been taken by any church of the faith named to accept the trust created by the will of said Hugh F. Ross. This is substantially all the evidence upon which the defendant Church bases its claim to the land in question.

The defendants Wasson base their claim to the land upon a right of descent from their mother, who was a widow of John E. Ross, a brother of Hugh F. Ross, the common source of title. Hugh F. Ross left surviving him no one entitled by blood to inherit from him except the brother, John E. Ross, who survived him ten years and died in 1870. John E. Ross left no issue or others capable of inheriting by reason of consanguinity and

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it is contended that under the statute his widow, who survived him, was the only person capable of inheriting, and that her right to take became vested upon the death of her husband subject to the life estate of the widow of the testator. The widow of John E. Ross in April, 1874, intermarried with one John Wasson, by whom she had two sons, who survived her and who are the individual defendants here. The mother of these defendants died intestate in October, 1910, and her husband died in November, 1911.

The court, upon the facts stated, found that the plaintiff had no interest in the land, and it having been shown from the admissions and agreements between said Church and the Wassons, defendants, that one-half of the net proceeds of the sale of said property and the net rents and income therefrom until the sale is effected is a proper and adequate sum to be devoted to the purpose of building a house of worship for said church, the court adjudges that the defendant church is entitled under the will of said Hugh F. Ross to have said land sold and conveyed under the direction and through the instrumentality of trustees named and the proceeds arising therefrom divided, one-half to the trustees of the said Church and the other half to the said defendants Wasson as tenants in common, share and share alike. Specific provisions are also made in this finding, not necessary to be set forth in a determination of the question here at issue, among others the naming of trustees to take charge of and account for the rents and profits arising from the land during the pendency of this appeal.

The right of the plaintiff to claim title to the land as an heir at law of Hugh F. Ross is precluded by the death of the latter February 15, 1860, and the birth of the plaintiff May 31, 1861. [Gates v. Seibert, 157 Mo. l. c. 272; Martin v. Martin, 250 Mo. l. c. 545.] Nor can plaintiff's claim of title as an heir at law of his mother, the widow of said Ross, be maintained. Under said Ross's will she only took a life estate in the land; to

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this limitation of her tenure she acquiesced by taking no steps to enlarge her interest into a fee to the one-half of said land as then and now authorized by statute (Sec. 5, chap. 56, R. S. 1855; Sec. 351, R. S. 1909). Upon her death, therefore, no inheritable estate was left to the plaintiff. This fact necessitates the conclusion that the deed made to this land in 1900 by the mother and step-father of plaintiff to him conveyed no such title as will enable the plaintiff to successfully assert an interest in such land at this time. Whatever estate was thereby conveyed was limited to the interest of the mother therein and terminated with her death. The nature of an estate by which land is held cannot be enlarged by a conveyance. A grantee cannot take more than the grantor has to convey. [Boothe v. Cheek, 253 Mo. 119; Potter v. Long, 217 Mo. 607; Turner v. Railroad, 130 Mo. App. 535.]

As to the claim of title under the Statute of Limitations, plaintiff's mother probated her husband's, Hugh F. Ross's will and qualified thereunder as executrix. In the absence of evidence to the contrary, and there is none, it must be presumed that she elected to take under the will, which created in her a life estate. Thus seized, she could not deal with the property in such a manner as to start the running of the Statute of Limitations adversely to the rights of the remainderman, who under the will is the residuary legatee. Her deed to plaintiff, therefore, could give him no greater right or claim to title than she possessed and his title, like hers, could only inure to the benefit of the remainderman. [McMurtry v. Fairley, 194 Mo. 502; Charles v. Pickens, 214 Mo. 212; Shoultz v. Lee, 260 Mo. l. c. 725.] The mother of plaintiff died in March, 1910, and whatever has been the nature of plaintiff's holding of said land since that time, a sufficient period has not elapsed to sustain a claim of title under the statute.

The plaintiff, who is the sole appellant, is the "party aggrieved" within the meaning of the statute (Sec. 2038, R. S. 1909) and our review of this case has

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therefore been limited to a consideration of the errors of which he complains. Under this state of facts we are not authorized to review the trial court's ruling that, although the defendant Church is the residuary legatee, the individual defendants are heirs and hence entitled to half of the proceeds of the sale of the land.

It will suffice to say that our affirmance of the judgment below is limited to the finding that the plaintiff is not entitled to recover. All concur; *Williams, J.*, not sitting.

Ex parte ROBERT E. HOLLIWAY, Petitioner.

Division Two, October 8, 1917.

1. **CONTEMPT: Sufficiency of Judgment.** A judgment which sets forth facts conveying definite information of the precise subject-matter under inquiry by the grand jury at the time contemnor refused to answer, is sufficiently certain as to such subject.
2. **_____: Revealing Secrets of Grand Jury.** Inquiry by the grand jury of a witness as to the source of information he caused to be published in a newspaper, that a certain person had been indicted, who had not been arrested, is a legitimate and proper subject of inquiry by the grand jury.
3. **_____: _____: Reasons for Statute.** The purpose of the statute in requiring the secrets of the grand jury to be kept inviolate and in forbidding a disclosure of the fact that an indictment has been found against a person not in actual confinement or under bail, is to prevent the escape of such person; but the fact that the statute forbids such revelations, is of itself sufficient reason, whether the offense charged be great or small.
4. **_____: _____: Excuse: To Accommodate Newspaper Reporter.** He who violates the command of the statutes forbidding a revelation of the fact that the grand jury has found an indictment against an accused who has not been arrested or bailed, cannot justify his conduct by the fact that the person to whom under the cover of confidential friendship he gave the information was the reporter of a newspaper who desired to "scoop" his competitor in the business of obtaining and printing so-called news.

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5. ———: Refusing to Testify Before Grand Jury: Constitutional Immunity. The constitutional provision against self-incrimination will not protect a witness before the grand jury in refusing to tell whether the information he published in his newspaper, that a certain person had been indicted, was obtained from a member of the grand jury or an officer of the court or a witness who had been before them. If any of those persons made a revelation of the information he was guilty of a misdemeanor, but a reporter who listened to the disclosure, or wrote it down, or reported it, was guilty of no offense, and cannot excuse himself from telling the grand jury which one of them gave him the information, on the ground that his answer would tend to incriminate himself—though an answer to an inquiry as to "where he got his information" might do so, but that is not decided, because he did not give his "constitutional rights" as his reason for refusal to answer that question.
6. ———: Term of Commitment: Error Corrected on Habeas Corpus. The judgment and commitment fixing the punishment of a contemnor, who has been properly adjudged guilty of contemptuously and contumaciously refusing to answer proper questions propounded to him by the grand jury, at imprisonment "until the further order of this court, or until he be otherwise legally discharged by due process of law," is manifestly erroneous, since the statute fixes the duration of punishment till contemnor gives the evidence which he had previously contemptuously refused to give; but he is not on that account entitled, on Habeas Corpus, to his unconditional discharge, but the contempt being criminal, as contradistinguished from civil contempt, the court, under the provisions of the statute (Sec. 5316, R. S. 1909), will assess the proper punishment.

Habeas Corpus.

WRIT DENIED.

A. T. Dumm for petitioner.

Frank W. McAllister, Attorney-General, for respondent.

FARIS, J.—This is an original proceeding under the Habeas Corpus Act, whereby petitioner, held in custody of one Anton B. Richter, as sheriff and ex-officio jailer of Cole County, under a commitment for an alleged contempt of court, for that, as it is charged, petitioner refused to

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answer certain questions propounded to him by the grand jury of said Cole County, now seeks his discharge.

Upon the issuance of our writ, the sheriff made return setting out in full the judgment and the order of commitment in virtue of which the sheriff justifies his action in detaining petitioner. Upon this return petitioner, urging its insufficiency as a matter of law, moves for judgment upon the pleadings. Since all matters necessary to an understanding of both the law and the facts of the case are set forth in the judgment of the trial court, we copy this judgment below, omitting merely formal parts, thus:

"Now at this day comes into court the grand jury heretofore empaneled, to-wit: George W. Shell, Foreman; T. G. Nilges, Kearney Collett, Robert Glover, Julius H. Conrath, Wm. Turbit, Ed. Allen, Joe Ortmeier, A. J. Musick, A. J. Moerschel, Geo. McFadden, and Paul Brace, accompanied by Robert E. Holliway, a witness duly subpoenaed before said grand jury, and reports to the court in writing that they have under consideration the question as to whether any member of the grand jury or any witness who has testified before the grand jury has violated their oaths by divulging and making known what the grand jury has had under consideration, or facts that have come to their knowledge which before the grand jury as a witness, and that the said Robert E. Holliway was duly summoned as a witness, and appeared before said grand jury and was duly sworn as a witness before said grand jury, as required by the statutes of this State, and that inquiry was made of him as to the source of the information he received appearing in the St. Louis Republic in its issues of Wednesday, September 19th, and Thursday, September 20, 1917, entitled "7 True Bills are Voted in Coal Inquiry," and purporting to have been sent to the said newspaper by said Robert E. Holliway, and that they have propounded to the said Robert E. Holliway, the following questions, all of which he had refused to answer.

"That the questions propounded and the answer of the said Robert E. Holliway thereto, were as follows:

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"Q. Where did you get your information? A. I can't tell you.

"Q. Did any member of the grand jury give you this information? A. I can't tell you.

"Q. Who told you seven indictments had been returned against Jno. W. Scott for grand larceny and embezzlement? A. I can't answer.

"Q. Why can't you answer? A. Standing on my constitutional rights.

"Q. I understand you to say that you refuse to answer those questions. A. You can place your own interpretation on that.

"Q. Did any man in this room tell you that seven indictments had been returned against Jno. W. Scott? A. Can't tell you.

"Q. Do you refuse to tell? A. You can place your own interpretation on that; I can't tell.

"And thereupon, the court, in the presence of the grand jury, and the said witness, Robert E. Holliway, did determine that the said witness was bound to answer the questions aforesaid, and both the grand jury and the said witness were immediately informed of the decision, and thereupon, the said grand jury with said witness retired, and afterward came into court with said witness, and informed the court that the said witness refused to answer said questions, and being interrogated by the court in regard thereto, the said witness informed the court that he would not answer said questions, in the presence of said grand jury, and thereupon the court did order and adjudge that the said witness Robert E. Holliway was guilty of a contempt of this court, on account of his refusal to testify, as aforesaid, and does adjudge that he the said Robert E. Holliway be committed to the jail of Cole County, Missouri, for such contempt, as provided by Section 5082, of the Revised Statutes of Missouri of 1909 and it is further ordered and adjudged by the court that the clerk of this court immediately issue and deliver a proper commitment under this order and judgment, directed to the Sheriff of Cole County, Missouri, who is also the jailer thereof, commanding and requiring him

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to commit the said Robert E. Holliway to the jail of the county aforesaid, and him there safely keep until the further order of this court, or until he be otherwise discharged by due process of law."

I. Three contentions are made by petitioner, all of which go to the alleged insufficiency of the judgment and the order of commitment, which follows **Judgment**. These are, to-wit, (a) that the article printed in the newspaper, headlines of which alone are set forth in the court's judgment, should have been copied in full therein; (b) that petitioner claimed his "constitutional rights" when interrogated by the grand jury, meaning thereby, counsel says, the privilege of refusing to answer the questions asked, because the answers thereto tended or might tend to incriminate him; (c) that under the law such refusal is justifiable, and (d) that the order of commitment is void, because it does not definitely fix the term for which petitioner was committed to jail. These contentions we will look to in their order briefly.

A mere cursory glance at the order of commitment shows the fallacy of the first contention. This order recites in pertinent phrase that the grand jury came into court and reported to the court in writing, "that they have under consideration the question as to whether any member of the grand jury, or any witness who has testified before the grand jury, has violated their oaths by divulging what the grand jury has had under consideration, or facts that have come to their knowledge while before the grand jury as a witness." Continuing, the order in substance says that petitioner was duly summoned as a witness, that he appeared before the grand jury, was sworn as a witness, and inquiry made of him as to the source of the information whereon he based his statement that "seven true bills are voted in coal inquiry," as set forth in an article printed in a certain designated newspaper, which article purported to have been written and sent to said paper by the petitioner. Then follows a true

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copy of the questions asked petitioner, and which he refused to answer, all having reference, as the context plainly shows, to the source of petitioner's information whereon he bottomed the statement to his newspaper that seven true bills had been found by the grand jury. Obviously it is as plain as day that the facts are sufficiently tied together so as to obviate either lack of certainty, or inability to convey definite information touching the precise nature of the subject-matter under inquiry by the grand jury.

If it be among the contentions of petitioner's learned counsel, that, as a matter of law, the subject-matter of the inquiry was such as that no contempt could be committed in refusing to answer the interrogatories propounded, counsel is likewise in error.

Legitimate Inquiry by Grand Jury. We do not gather, however, that counsel goes so far in his contentions, but rather that he concedes this phase of this point, deeming it wise to hang this defense solely upon a bald technicality. But lest we err through misunderstanding counsel, we pause a moment to say that it is too plain for argument that the subject of the inquiry then before the grand jury was a legitimate one, and one about which the grand jury was not only permitted to inquire, but one about which it was its sworn duty to inquire. Not only do the individual component members of a grand jury take an oath that they will not divulge the secrets of the grand jury room (Sec. 5069, R. S. 1909), but the divulging of certain of these secrets is made a misdemeanor by statute. [Sec. 5088, R. S. 1909.] The above section thus provides:

"No grand juror shall disclose any evidence given before the grand jury, nor the name of any witness who appeared before them except when lawfully required to testify as a witness in relation thereto; nor shall he disclose the fact of any indictment having been found against any person for a felony, not in actual confinement, until the defendant shall have been arrested thereon. Any juror violating the provisions of this section shall be deemed guilty of a misdemeanor."

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By express statute this grand jury was privileged to indict, in fact it was its duty to indict, any individual member of its body, for any offense which the proof produced before the jury might show such juror to have committed. [Sec. 5083, R. S. 1909.] Another statute requires that every witness who appeared before the grand jury should be sworn not to divulge any matter which the jury might have under consideration, or about which the witness might be examined, or any matter which should come to the witness's knowledge while before the grand jury. [Sec. 5070, R. S. 1909.] A violation of the witness's oath in the behalf above, is made a misdemeanor. [Sec. 5071, R. S. 1909.] Other statutes make it a misdemeanor for any judge, prosecuting attorney, or other officer of any court to disclose the fact that an indictment has been found against any person, not in actual confinement, or under bail to answer such charge. [Sec. 5100, R. S. 1909.] The section last above is not pertinent here, because the class of persons therein mentioned was not under investigation, according to the language of the judgment, and order of commitment. We mention the latter statute in passing, as illustrative of the policy of the law to keep, and strenuously to enforce the keeping of the secrets of the grand jury room inviolate. Reasons for this policy are obvious and not far to seek, but reasons are not necessary when a statute though it may itself state specifically no reason, yet plainly forbids the divulging of these matters. Section 5099, Revised Statutes 1909, is a type of all of the sections of the sort confronting us. By its obvious terms it clearly foreshadows the reasons why divulging information as to the finding of an indictment, prior to the arrest of the accused, is forbidden, whenever such accused is not in actual confinement or under bail. This reason is to prevent the escape of the accused. It is manifestly no answer to this statute to say that in these cases the persons indicted, though not in custody, and though not under bail, would yet not attempt to escape, but would stay and undergo trial, and therefore that divulging the fact of indictment would do no

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harm. The statute law, if it is not to be written in a thousand volumes, can possess no such elasticity as to allow such an excuse as the above. In the very nature of things there must be but one rule as to all indictments for whatever crime or offense; however heinous, or the converse thereof, such an offense may be, and so the statute ordains. If the crime under investigation had been merely disturbing the peace, or obstructing a public highway, the rule is the same as for murder, or rape, or treason, though the reason for the rule might seem in the latter cases to be far more cogent. Nor does it change the rule or mitigate the offense, that he who violates any one of the above statutes, was under the guise of friendship induced to do so by someone desiring to "scoop" his competitor in the business of obtaining and printing so-called news. The cold commercial desire to print facts in advance of the time when public policy, or the public welfare permits the same to be made public, may be good business, but it is poor patriotism, and worse citizenship. It is at best a vicious sort of harmful intermeddling with the enforcement of the law, or the conservation of the public welfare.

Since then the clearly stated matters and things under investigation were proper matters of investigation, and matters which it was the duty of the grand jury to investigate, and since the questions asked were legal and proper ones, no reason exists in law, why petitioner should not have been compelled to answer them, or refusing to do so, why he should not be committed to jail, there to remain till he does see fit to do so. [Sec. 6372, R. S. 1909.] For the law does not tolerate the quixotic but strabismussed idea of refusing on so-called principle to violate the confidence of a law-breaker. Such a principle the law refuses to recognize for reasons of public policy, morals and welfare, which will instantly occur to the law-abiding citizen. It follows that this contention must be disallowed.

II. Passing the question that petitioner by what he said did in fact claim immunity from answering, because his answers would tend to incriminate him, we come to

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the more important question here (which **Self-incrimination**. includes and disposes of the question of fact raised touching the verbal sufficiency of his claim), whether it was under the surrounding circumstances and the law possible for petitioner to claim immunity on this ground.

Of course such claim to immunity, when such immunity really exists, is always to be bottomed upon the guarantee of the Bill of Rights (Sec. 23, art. 2, Constitution of Missouri), which forbids that any "person shall be compelled to testify against himself in a criminal cause," as this provision is interpreted by this court in the case of *State v. Young*, 119 Mo. 495, wherein it was held that the immunity conferred by the Constitution extended to other causes, places and courts, besides trials merely of criminal causes.

There has been much loose writing upon this question of immunity in this jurisdiction. But Judge GANTT, speaking for this Division, in the case of *Ex parte Gauss*, 223 Mo. l. c. 286, said:

"In our opinion, the petitioner having testified that he could not answer the questions without criminating himself, and it not being entirely plain that his answers might not lead to a prosecution of himself, we think the circuit court erred in committing him for contempt in refusing to answer."

This rule will be sufficient for the purposes of this case. So we need not pause to inquire whether the tendency of some of the Missouri adjudged cases has not been toward a narrow and technical rule which would leave the witness the sole untrammeled judge of the incriminatory tendency of the questions propounded to him. Such a rule as the latter would put the entire enforcement of justice at the mercy of a wilful and recalcitrant witness, and might well block all prosecutions for crimes. But we need not quarrel with these far-flung cases here. The manifest converse of the negatively-phrased rule announced in the *Gauss* case is present here in the instant case, and it is "*entirely plain*" that the answers of petitioner to the

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questions which were here asked him, and which he refused to answer, could not tend in any degree to incriminate him, save and except the broad one as to "where he got his information," and as to this one petitioner did not properly save his "constitutional rights." It can be seen that the answer to the broad question, as to where petitioner got his information, that is, *how and from what place he got it*, might under some circumstances tend to incriminate the witness. For if he had obtained access to the papers in the case by burglary, or by highway robbery, or by the commission of some other crime, and upon being questioned as to his source of information should swear that his answers would criminate or tend to criminate him, it is obvious that the point would be well taken. Ordinarily, however, the fact that the witness must make his claim of immunity under oath prevents a resort to a claim of such immunity as a mere subterfuge to escape answering, except where the fact of incriminatory tendency really exists. But few witnesses in a court charged with law-enforcement follow the quixotic principle of loyalty to the confidences of a law-breaker, so far as to permit it to become a suborner of perjury.

The other questions asked petitioner went to the identity of the person or persons who gave him the information which he caused to be published. Under the several statutes which we have quoted or made reference to, the crime denounced is directed against the members of the grand jury, certain officers of the court, and witnesses who divulge outside of the jury room facts which have come to their knowledge by reason of having been witnesses before the grand jury. If a juror, or an officer of the court, or a witness who has been before the grand jury should have disclosed to petitioner prior to the arrest of the persons indicted, the fact that indictments had been found against such persons, the juror, officer, or witness would be guilty of a misdemeanor, but petitioner as the mere recipient of the disclosure would be guilty of no offense, either for that he listened to the disclosure, or that he repeated it, or wrote it down and caused it to be published after he heard it. It follows that this contention must likewise be disallowed.

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III. Coming to the last point reserved for discussion, we meet a more troublesome question. By a reference to the closing language of the order of commitment, which followed substantially the judgment of contempt, which we quote in our statement, we find this language defining the term and period for which the imprisonment inflicted was to endure, to-wit: "You, the said keeper of the said jail are hereby required to receive the said Robert E. Holliway, into your custody and him confine in the jail of said county *until the further order of this court, or until he be otherwise legally discharged by due process of law,* and for so doing this shall be your warrant."

From the above excerpt it clearly appears that the term of imprisonment assessed by the circuit court is erroneous, for that it fixed the duration of petitioner's punishment "until the further order of the court, or till he be otherwise legally discharged by due process of law," instead of fixing the duration of such punishment till petitioner gives the evidence which he had before contumaciously refused to give, as provided by our statute, which fixes the punishment for contempts of this sort. [Sec. 6372, R. S. 1909.]

Learned counsel for petitioner strenuously contends that this error in fixing the punishment herein is fatal, and entitles petitioner to his unconditional discharge from custody. It is patent that such a contention has no merit, in either abstract justice, logic, or morals, and that if it is to be allowed at all, it must be excused as a far-fetched application of a most attenuated technicality, against which the Press of the State have long inveighed most piously. We think, however, that the Legislature has saved us from the necessity of absolutely discharging petitioner upon so bald a technicality, after his guilt has been demonstrated.

This is a criminal contempt, committed in the presence of the court, and bottomed on contumacious disregard of the court's authority and office, as contradistinguished from a civil contempt, which arises from the mere violation, ordinarily outside of the court's presence, of an order of court in a civil proceeding. Therefore, since it is a criminal contempt, no reason is seen why

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the provisions of section 5316, Revised Statutes 1909, should not apply to the solution of the contention made. This section of our statute in pertinent substance reads thus:

“No person shall be discharged under the provisions of the Habeas Corpus Act . . . for the reason that the judgment by virtue of which such person is confined . . . was erroneous as to time or place of imprisonment, but in such case it shall be the duty of the court or officer hearing the case to sentence such person to the proper place of confinement, and for the correct length of time, from and after the date of the original sentence, and to cause the officer or other person having such prisoner in charge to convey him forthwith to such designated place of imprisonment.”

We are constrained to hold that the statute which we quote above covers fully the situation presented by the facts in this case. If the circuit court of Cole County had had no jurisdiction of the contempt proceedings, or if it had exceeded its jurisdiction, or if it had done something in finding petitioner guilty which the law, or even the facts of the contempt charged did not warrant, then we could absolutely discharge petitioner in this proceeding. [Ex parte Creasy, 243 Mo. 679.] For then the action of the trial court being void, the judgment which it gave would be subject to collateral attack. [2 Freeman on Judgments, sec. 619; Hurd on Habeas Corpus, 327.] But the court had jurisdiction of petitioner's person and of the subject-matter, as well as jurisdiction to sentence petitioner to jail, and the court proceeded correctly, as we have seen above, in all things, except only as to the period fixed as the duration of petitioner's imprisonment. In this the learned trial court fell into error, seemingly by a mere loose selection of words. In such a situation we are not allowed to discharge the petitioner from custody, but both the statute quoted and the cases adjudged thereunder make it our duty to render the proper and lawful judgment in the case, and then to remand the petitioner, till he shall so far repent of his recalcitrancy as to answer the questions propound-

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ed to him. [Sec. 5316, R. S. 1909; *Ex parte Kenney*, 105 Mo. 535; *Ex parte Cohen*, 159 Mo. 662; *Ex parte Renshaw*, 6 Mo. App. 474.] This is not only the rule in this State under our statute, but it is the modern and common sense rule in the great majority of other jurisdictions, some of which at least seem to have no statute on the subject. [*Ex parte Cica*, 137 Pac. 598, 51 L. R. A. (N. S.) 373; *In re Chase*, 18 Idaho, 561; *Martin v. District Ct.*, 37 Colo. 110; *In re Richards*, 150 Mich. 421; *Ex parte Foster*, 138 Pac. 849; *In re Blystone*, 75 Wash. 286; *Harris v. Lang*, 27 App. D. C. 84; *Connella v. Haskell*, 87 C. C. A. 111; *De Bara v. United States*, 40 C. C. A. 194; *In re Taylor*, 7 S. D. 382; *In re Graham*, 138 U. S. 461; *In re Swan*, 150 U. S. 637; *State ex rel. v. Klock*, 48 La. Ann. 67; *Sennott's Case*, 146 Mass. 489; *Ex parte Burden*, 92 Miss. 14; *In re Fanton*, 55 Neb. 703; *Ex parte Mooney*, 26 W. Va. 36; *In re Graham*, 74 Wis. 450; 12 R. C. L. 1208.]

Proceeding to perform our duty under the statute supra: It is ordered, considered, and adjudged that the petitioner, Robert E. Holliway, for his contempt of the circuit court of Cole County, in the State of Missouri, for that he contemptuously and contumaciously refused, and continues to refuse to answer certain legal and proper questions to him propounded by the grand jury, and whereof he has been in and by said Cole County Circuit Court heretofore lawfully tried and convicted, be and he is hereby sentenced to be imprisoned in the common jail of the county of Cole aforesaid, and in custody of Anton B. Richter, sheriff and *ex-officio* jailer of said county, therein to be held, without bail, for and during such term and period as he the said Robert E. Holliway, shall so continue contumaciously to refuse to answer such questions (unless in the meantime said Cole County Circuit Court shall adjourn) and until he, the said Robert E. Holliway, shall give such evidence.

Let the writ be denied and the petitioner remanded to the custody of respondent Anton B. Richter, as sheriff and *ex-officio* jailer of Cole County aforesaid, pursuant to the above judgment of this court. All concur.

CASES DETERMINED
BY THE
SUPREME COURT
OF THE
STATE OF MISSOURI
AT THE
OCTOBER TERM, 1917.

THE STATE v. ALBERT LEE, Appellant.

In Banc, February 9, 1916.*

1. **CRIMINAL INTENT:** Presumption: Possession of Property: Corpus Delicti. The possession by one of the property of another does not raise any presumption, nor is it of itself evidence, that the property was stolen. The possession must be accompanied by other incriminating circumstances, inconsistent with the possessor's innocence. The evidence in this case does not establish beyond a reasonable doubt that the property was stolen or the defendant's guilt.
2. _____: Instruction: Unexplained Possession of Stolen Property. The purpose of an instruction on the question of the presumption of guilt arising from the recent unexplained possession of stolen property, is to aid in determining the identity of the felonious taker; and where defendant admits that the hog alleged to have been stolen was by his direction taken from the range and placed in his barn by his hired hands, such an instruction should not be given, since the question at issue is not the identity of the taker, but the intent with which the hog was taken.
3. _____: _____: Assuming Property Was Stolen. Where the issue is whether or not the hog found in defendant's possession was stolen, an instruction which assumes that the hog was stolen is erroneous.

*NOTE.—Certified to the Reporter February 5, 1918.

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Appeal from Butler Circuit Court.—*Hon. J. P. Foard*,
Judge.

REVERSED AND DEFENDANT DISCHARGED.

E. R. Lentz for appellant.

John T. Barker, Attorney-General, and *S. P. Howell*, Assistant Attorney-General, for the State.

WILLIAMS, C.—Under an indictment charging the defendant with stealing six hogs, the property of one Walter Reynolds, the defendant was tried in the circuit court of Butler County, found guilty, and his punishment assessed at two years in the penitentiary. Defendant has duly perfected an appeal to this court.

The evidence upon the part of the State tends to show that Walter Reynolds, the prosecuting witness, lived on a farm about three-fourths of a mile north of the farm upon which the defendant lived, near Neelyville, in Butler County, Missouri. Reynolds owned a small black sow. The sow was marked with a crop and split in the left ear, and an aluminum button, bearing the name of "Walter Reynolds" on one side and "Neelyville, Missouri" on the other side, was fastened in the sow's right ear. This button was about the size of a quarter. The sow was turned out on the range which extended up to defendant's place, and would come up to prosecuting witness's home nearly every day. During the last week in September, 1913, she failed to come up as usual, and Mr. Reynolds did not see her again until October 14, 1913, on which date he found her in defendant's barn. At that time she had five small pigs and was fastened up in a stall in the barn with some other hogs.

It appears that on October 13th, one Bradford and a Mr. Molloy went to defendant's place in search of some missing hogs. They told defendant that they had heard he had some hogs of theirs. Thereupon defendant said, "Come on and I will show you," and

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he took them to the barn and showed them the hogs that were fastened in the stall, but they did not find the hogs they were looking for. They noticed a black sow with five pigs in the stall at that time. Defendant said the hogs in the barn belonged to him.

Later, that same day, Bradford and one McClain went back to the farm, but it does not appear that defendant was then present. On the next day, October 14th, Bradford, Molloy and the prosecuting witness and his mother went to defendant's farm, but it does not appear that the defendant was present or that they had any conversation with him. When they reached the barn, Reynolds examined the black sow and, upon raking the mud from her ear, found the aluminum button bearing his name.

Some time later, on that day, the prosecuting witness instituted replevin suit to replevin the sow and returned to defendant's place with the constable and Mr. McClain. It appears that McClain and the prosecuting witness went to the barn, and that the constable went out into the field where he found defendant at work. There the constable served the replevin writ upon the defendant and the defendant said that the hogs did not belong to Reynolds. The officer told defendant that Reynolds had identified the black sow by the aluminum button in her ear, and defendant said, "If that black sow has got Walter Reynolds' button on her ear, I will eat it." Defendant then accompanied the officer to the barn and they scraped the mud off of the sow's ear and showed defendant the button. It does not appear what defendant did or said after that. None of the State's witnesses knew who put the sow in the barn or how long she had been there. They testified that the pigs appeared to be about one week old. Some of the witnesses said that the pen in which the hogs were fastened in the barn was boarded up about four feet and that it was dark in there. Other witnesses described the pen as a stall with the opening boarded up about four feet. The prosecuting witness's

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mother testified that she accompanied the men to the barn when they found the sow and pigs in the barn with a lot of other hogs—one of Mr. Abington's, one of Mr. McClain's and one that the witness did not know.

The defendant testified, in his own behalf, that, on October 12th, he owned a black sow which was running loose on the range and that he was expecting her to have pigs. At that time, he had two hired hands working for him, one a "hobo" called Shorty, and the other was Howard Rowe, whose home was somewhere in Arkansas. The defendant, before starting on a trip to Poplar Bluff, told these two hired hands that if the black sow came up that day to put her in the barn, because he was expecting her to have pigs. When he returned from Poplar Bluff, the next day, the hired hands told him that they had put the black sow in the barn and that during the night she had delivered pigs. That when Bradford and Molloy came to his house, on the 13th of October, and inquired for hogs, he took them to the barn and opened the door and showed them the hogs in the barn. The defendant, at that time, saw the black sow and the pigs and supposed they were his, but said that it was a little dark in there and that he did not pay much attention to the hogs at that time, and that he did not know that the black sow was not his until the replevin writ was served on him the next day, at which time he went to the barn with the officer and was shown the button in the sow's ear.

He testified that his sow and the prosecuting witness's sow were about the same size and that his sow had a crop in the left ear and that nobody could have told that the sow he had in the barn belonged to the prosecuting witness until the mud was scraped off her ear, which was the first time that he had information that the sow did not belong to him. Defendant's sow finally came up two or three weeks afterwards without any pigs. He presumed that something had destroyed them. He testified that he did not know where "Shorty" went after he quit working for him, and that Rowe lived somewhere in Arkansas.

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(It appears that defendant was not indicted until April 24, 1914, some six months after the occurrence of the alleged offense, and that the trial did not occur till April, 1915, eighteen months after the date of the alleged offense).

Defendant's wife corroborated him in regard to the two hired hands putting the hog in the barn while the defendant was away in Poplar Bluff. Defendant's son Willie also corroborated the defendant and testified further that he had just come home from school and saw Shorty and the other hired hand driving the black sow around to the barn door and that she did not have pigs at that time. The son also heard "Shorty" tell defendant, at breakfast the next morning, that they had put the black sow up.

In rebuttal, the prosecuting witness testified that he never saw "Shorty" or Rowe about the place. Witnesses Molloy and Bradford testified that they had been around defendant's place about four times in October, but that at none of those times had they seen "Shorty" or Rowe working there. Upon cross-examination, they admitted that "Shorty" and Rowe might have been working for the defendant on those occasions and they had failed to see them, and admitted that on one or two occasions they had been to defendant's place and had not seen him there.

Instruction Number 6, given on behalf of the State, was as follows:

"If the jury believe from the evidence that soon after the commission of the offense charged in the indictment, if you believe from the evidence an offense was committed, the property taken at the time of commission of the offense was found in the possession of the defendant, such possession is presumptive evidence of the defendant's guilt, and if such possession of such stolen property is not satisfactorily explained by defendant, it will be conclusive evidence of his guilt; and the jury are further instructed that it devolves on the defendant to explain such possession."

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I. Appellant contends that there was not sufficient proof of the *corpus delicti* and that, therefore, the evidence was insufficient to support the verdict. We think this point well taken.

Presumption Arising from Possession. The facts shown by the testimony are stated fully in the foregoing statement and it becomes, therefore, unnecessary to restate the same in detail here. In substance the evidence discloses that the defendant was found in possession of a hog which belonged to the prosecuting witness, and which, prior to that time, had been running at large on the range which extended from the home of the prosecuting witness to that of the defendant. Defendant's evidence tended to show that the hog was similar in description to one of his own upon the range and was, by his two employees, placed in the barn under the mistaken belief that it was the property of defendant.

The mere fact that the hog disappeared from the range would not be sufficient proof that the hog was feloniously taken therefrom—this, because it is a matter of common knowledge that stock running out upon the range, in common with other stock, may disappear therefrom by becoming mixed up with the other stock and follow it off, or by being driven off by mistake, just as readily as it may be feloniously taken therefrom, and the mere proof of disappearance from the range would not, in and of itself, justify the presumption that it had been stolen. And the further fact that the hog was afterwards found in defendant's possession would also fail to prove that the hog had been stolen. The possession by one of the property of another does not raise any presumption that the property was stolen. The correct rule in this regard is stated as follows: "The possession of property does not of itself raise any presumption, nor is it indeed any evidence, that the property was stolen. There must be other evidence of the *corpus delicti*." [8 Ency. of Evidence, pages 99-100, and cases therein cited.]

The disappearance of the hog from the range and the subsequent finding of same in possession of the de-

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fendant would, no doubt, furnish material for links in a chain of circumstantial evidence, if they were accompanied by other incriminating circumstances. But the necessary incriminating circumstances are here absent. The conduct of the defendant at each time he was questioned about the hogs was not that of a man trying to conceal, and therefore the conduct of a guilty man, but he showed, at all times, a ready willingness to have the hogs seen and examined. The facts disclosed are not inconsistent with the theory of defendant's innocence. Very appropriate to the situation here is the following language of the Court of Appeals of New York in *McCourt v. People*, 64 N. Y. 583, l. c. 586-7, to-wit:

"Whether the criminal intent existed in the mind of a person accused of crime at the time of the commission of the alleged criminal act, must of necessity be inferred and found from other facts which in their nature are the subject of specific proof; and for this reason it is, that the other constituents of the crime being proved, it must, ordinarily, be left to the jury to determine, from all the circumstances, whether the criminal intent existed.

"In some cases the inference is irresistible, and in others it may be, and often is, a matter of great difficulty to determine whether the accused committed the act charged with a criminal purpose. But there are usually found in connection with an act done, which is charged to be criminal, attending circumstances which characterize it, and if these are absent, or the circumstances proved are consistent with innocence, a conviction cannot be safely allowed."

It does not appear that the prosecuting witness had any conversation with defendant prior to the time the writ of replevin was served, and judging from the conduct of defendant when questioned by Bradford and Molloy, concerning the lost hogs of Bradford, it would appear that the prosecuting witness could easily have obtained possession of his hog had he gone to defendant and made his claim instead of going to the trouble of bringing a suit in replevin. While it is true that

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defendant's conduct does not, necessarily, establish his innocence, yet the same may be mentioned for the purpose of showing that it contained nothing incriminating. The burden was upon the State to establish defendant's guilt and not upon the defendant to establish his innocence. The evidence at most can only be said to raise a suspicion of guilt against the defendant, but suspicion, alone, is never sufficient to support a verdict. [State v. Jones, 106 Mo. 302; State v. Morney, 196 Mo. 43; State v. Ruckman, 253 Mo. 487.]

After carefully considering the evidence in all of its phases, we have reached the conclusion that it falls short of the *quantum* of proof which would justify the triers of fact in finding, beyond a reasonable doubt, that the defendant is guilty. [State v. Counts, 234 Mo. 580; State v. Claybaugh, 138 Mo. App. 360, l. c. 364; State v. Bass, 251 Mo. 107.]

II. The court erred in giving said instruction numbered 6, on the question of the presumption of guilt arising from the recent unexplained possession of stolen property. In this case, defendant admitted that the hog was taken from the range and placed in his barn, by reason of his orders to his two employees. The question at issue, therefore, was not the identity of the person who took the hog, but the intent with which the hog was taken—whether innocently or feloniously taken. Under such conditions this instruction (the function of which is to aid only in determining the identity of the felonious taker, State v. Warden, 94 Mo. 648, l. c. 652) should not have been given. [State v. Christian, 253 Mo. 382, l. c. 396.]

The instruction is also subject to criticism in another respect, viz., in one portion of the instruction it assumes that the property was stolen. In a case where there was no dispute concerning the State's claim that the property in question had been stolen, this assumption would, perhaps, not be considered as harmful, but in a case, like the present, where that issue is a contested one, the assumption of that fact in the in-

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struction would, no doubt, work serious injury to the rights of the defendant.

The judgment is reversed and the defendant discharged.

Roy, C., concurs.

PER CURIAM: The above cause coming into Court in Banc, the opinion therein by WILLIAMS, C., is modified and adopted. *Woodson, C. J., and Graves, Walker, Faris and Blair, JJ., concur; Bond and Revelle, JJ., dissent.*

JOHN A. BARRETT et al., Plaintiffs in Error, v.
STODDARD COUNTY et al.

Division Two, October 9, 1917.

1. **RES ADJUDICATA:** Record of Former Trial: Writ of Error. Where the Court of Appeals had affirmed the judgment of the trial court rendering judgment for damages against plaintiffs on their bond in a dissolved injunction and had remanded the cause to the circuit court with directions to enter judgment for a designated sum as of a certain date, and the circuit court had complied with that mandate, the interested parties being present, plaintiffs cannot, by a writ of error sued out of the Supreme Court to review this last judgment, inject into the case, to aid the writ, the record of the trial which resulted in the judgment from which the appeal was taken to the Court of Appeals, for the issues raised in that trial had become *res adjudicata*, and form no part of the record and proceedings brought up by the writ of error, and hence cannot be reviewed by the Supreme Court.
2. **APPELLATE JURISDICTION:** Nominal Party. Jurisdiction cannot be conferred by the presence of a merely nominal party.
3. _____: County as Nominal Party: Motion for Damages on Injunction Bond. An injunction brought by a bank against the county and another bank to restrain the county treasurer from depositing the county funds in the defendant bank designated as county depository had been dissolved, and on appeal to the Supreme Court 272 Mo.—9.

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the judgment was affirmed. Thereafter upon motion to assess damages on the injunction bond the court rendered judgment for defendant bank in the sum of \$7000, and plaintiffs sued out a writ of error to the Supreme Court. Held, that the county was only a nominal party to the proceedings and had no right to file such a motion, because the interest on its deposits, about which the original suit centered, had been paid, and if the revenue laws were involved they were involved only in the original proceeding, which was settled on the former appeal; hence, the Supreme Court has no jurisdiction of the writ of error.

Error to Howell Circuit Court.—*Hon. W. N. Evans*,
Judge.

WRIT QUASHED.

Thomas F. Lane, J. L. Fort and Giboney Houck
for plaintiff in error.

Mozley & Woody and Wammack & Welborn for
defendant in error.

(1) Every issue on the merits of this case was briefed, argued and submitted to the Springfield Court of Appeals, and its decision and judgment thereon became and was a final adjudication of all such matters, and no other court will interfere therewith. Any other rule of procedure would lead to intolerable chaos. *Hope v. Blair*, 105 Mo. 93; *McLure v. Bank*, 263 Mo. 134; *Emmert v. Aldridge*, 231 Mo. 128; *Cantwell v. Johnson*, 236 Mo. 603. (2) When the Springfield Court of Appeals (183 S. W. 644) remanded this cause to the Circuit Court with directions to enter judgment for \$7000 as of the date of overruling of the motion for new trial, it was a final determination of the cause, and the only thing the trial court could do under the law was to enter judgment in strict accordance with that direction. *Allen v. Choteau*, 74 Mo. 56; *Bridge Co. v. Stone*, 194 Mo. 175; *Spratt v. Early*, 199 Mo. 491; *Smith v. Kiene*, 231 Mo. 215; *Keaton v. Jorndt*, 259 Mo. 179; *McLure v. Bank*, 263 Mo. 128. (3) The contention is made that jurisdiction of this cause rests in

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this court because Stoddard County is a party, and a construction of the revenue laws is involved. Neither of these contentions is tenable. This is purely an action to assess damages on an injunction bond. The record discloses that Stoddard County has no interest in the matter whatever. It is true that the action is ancillary to a proceeding to which, in some sort, the county was a party, and had some interest, and the appeal in the main case did go to the Supreme Court, but when that appeal was determined by this court, the county's connection with the case ceased. It filed no motion to assess damages. The evidence shows it suffered none, in fact, the City Bank having paid it the same interest that the Bank of Essex would have paid, had it been permitted to carry out its contract. The same statement will suffice as to the revenue laws. It seems to us absurd to say that in this simple action to assess damages on an injunction bond, the revenue laws of this State are involved. (4) This court, has no jurisdiction of this proceeding for the reason that on the 7th day of April, 1916, when the judgment was entered in the Howell Circuit Court, in accordance with the mandate of the Springfield Court of Appeals, the amount in controversy, both judgment and interest, was only \$7432.76.

WALKER, P. J.—This case is here upon a writ of error issued June 21, 1916. The purpose of the writ is to secure a review of the record and proceedings in a certain case theretofore pending in the circuit court of Howell County in which a judgment had been entered in compliance with a mandate of the Springfield Court of Appeals.

A chronological resume of all the facts nearly and remotely connected with this case is presented. While much of this is extraneous and cannot be considered in determining the matter at issue, its statement will afford an opportunity for a better understanding of the case than can otherwise be obtained.

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A temporary injunction was granted at the instance of plaintiffs by the circuit court of Stoddard County in July, 1907, restraining the treasurer of that county from depositing its funds in the Bank of Essex, which had theretofore been designated as the county depositary, and directing that such funds be deposited in the City Bank of Bloomfield. An injunction bond was given upon the granting of the temporary writ. A change of venue was then taken to Howell County by defendants, where, upon a trial in February, 1909, a judgment was rendered for defendants and as a consequence the writ of injunction was dissolved. Defendants thereupon filed a motion for damages on the injunction bond, and before its determination plaintiffs appealed from the ruling of the circuit court on the merits to the Supreme Court, where the judgment of the circuit court of Howell County was affirmed. Thereafter the motion to assess damages on the injunction bond was continued from time to time until December, 1914, when it was tried before a jury and defendants' damages fixed at \$10,000, and after a *remititur* a judgment was rendered by the court for \$7,000. An appeal therefrom was granted plaintiffs to the Springfield Court of Appeals, where, after a review of all of the facts, the judgment of the trial court was on February 16, 1916, affirmed (183 S. W. 644), and it was ordered that the cause be remanded to the circuit court of Howell County and that it enter a judgment for the sum of \$7,000 as of the date of the overruling of plaintiffs' motion for a new trial therein. Plaintiffs thereupon filed motions for a rehearing and to transfer the cause to the Supreme Court, both of which were by the Court of Appeals overruled March 11, 1916, and a mandate in conformity with its judgment was transmitted to the circuit court of Howell County. On April 7, 1916, all the parties being present, the circuit court of Howell County, in compliance with the mandate of the Springfield Court of Appeals, entered judgment in favor of the Bank of Essex and against the City Bank of Bloomfield and the sureties on its injunction bond for the sum of \$7,000. An affidavit for an appeal to the Supreme Court from this judgment was filed by the plain-

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tiffs and an appeal was granted to the Springfield Court of Appeals May 28, 1916. Within the time granted plaintiffs filed their bill of exceptions in said court and on June 16, 1916, dismissed their appeal therein and sued out a writ of error to the Supreme Court. In aid of this writ not only the record of the proceedings relative to the entry of the judgment by the circuit court in compliance with the mandate of the Court of Appeals is here submitted, but also the record of the proceedings of a former trial of this case, in which there was a judgment for defendants and upon appeal to the Court of Appeals the same was affirmed, followed by a mandate to the circuit court as above stated. The course pursued by the plaintiffs in error in the preparation of this abstract is not only anomalous but unauthorized. The parties and the issues in the case tried in the circuit court and affirmed upon appeal in the Court of Appeals being the same as in the instant case, the matters determined upon that appeal must be regarded as having been finally determined, and they cannot be galvanized into life as undecided issues by incorporating them into the record in the case under consideration; in other words, they are *res adjudicata*. [Cape Girardeau & Thebes Bridge Term. R. R. Co. v. So. Ill. & Mo. Bridge Co., 215 Mo. 286; Meriwether v. Publishers, 224 Mo. 617; Benton v. St. Louis, 248 Mo. 98; Bagnell Timber Co. v. Railroad, 250 Mo. 514; Armor v. Frey, 253 Mo. 447; Scott v. Realty & Imp. Co., 255 Mo. 76.]

All prior matters having been adjudicated, the record and proceedings ordered to be brought up under our writ "that error, if any there be, may be corrected," etc., has reference only to the record of the judgment of the circuit court of Howell County entered in compliance with the mandate of the Court of Appeals. Compliance therewith is the trial court's only alternative. [Bagnell Timb. Co. v. M. K. & T. Ry. Co., 242 Mo. 11; State ex rel. v. Lamb, 174 Mo. App. 360; Ward v. Haren, 183 Mo. App. 569.] Our review, therefore, must be limited to consideration of the court's action in this regard.

We have heretofore had occasion to consider this question in Meyer v. Goldsmith, 196 S. W. 745, in which

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we reached the conclusion, under facts identical with these at bar, that the circuit court had no other alternative than to comply with the mandate of the appellate court, and upon a showing that this had been done its action would not be interfered with.

There are no assignments of error assailing the integrity of the judgment we are authorized to review. The assignments made have reference only to errors alleged to have been committed during the first trial. These, as we have shown, were finally disposed of in the opinion and judgment of the Court of Appeals (183 S. W. 644). If this were not true, not only in this case but in others, the courts, instead of tending to terminate controversies by the finality of their judgments, would but offer opportunities for unending strife. There being apparent in this record, therefore, no substantial reason why we should interfere with the judgment of the trial court in its entry of the mandate of the Court of Appeals, we decline to do so.

The result of this conclusion would be an affirmance of the judgment of the circuit court. Another question, however, is acutely presented by the record which renders a formal declaration of this conclusion unnecessary. It is that of this court's jurisdiction to entertain and determine the appeal in this case. The grounds of our alleged jurisdiction as asserted by plaintiffs in error, is that one of the parties defendant is a county and that a construction of the revenue law is involved. The writ of error is based upon a judgment rendered upon a motion to assess damages on an injunction bond. Stoddard County has no interest in this matter. In the original proceeding out of which this action arose the county did have an interest in the funds in controversy, but this case was appealed to the Supreme Court and there determined. Thus determined, whatever interest the county had in the controversy ended. Furthermore, its right to file the motion to assess damages on the injunction bond did not exist, because the interest on its deposits, about which the original suit centered, had all been paid, and as a consequence it would have been entitled to no damages in said suit and hence did not join therein.

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While, as a general rule, all of the obligees should join in the motion to assess damages on an injunction bond, a non-joinder is permissible if cause exists therefor. [Ohnsorg v. Turner, 33 Mo. App. 486; Jones v. Mastin, 60 Mo. App. 578.] The county's presence, therefore, as a defendant on the face of these proceedings, is due not to its being a real party in interest under the general requirements of our procedure, but to its having been made a party by plaintiffs to the original action and as a consequence continued as such in the motion to assess damages on the bond. By jurisdiction we mean the right to hear and determine. A nominal party to a proceeding has no rights therein to be heard or determined and therefore a court can acquire no jurisdiction by reason of his presence.

The nearest approach to a revenue law being involved is the fact that the original suit was concerning the interest on county funds. This, as stated, had been fully determined and the action here under review was simply in regard to the assessment of damages on an injunction bond.

Both of these questions were presented to and considered by the Court of Appeals, which ruled, as we do, adversely to the contention of the plaintiffs in error.

No facts are now submitted persuasive of our right to hear and determine this case, and while we have held, upon a review of all of the testimony relevant and otherwise, that we will not interfere with the judgment of the circuit court, we hold in addition that the writ of error was improvidently issued and should be quashed. It is so ordered. All concur.

W. E. CLARK et al., Constituting Board of Managers
of STATE HOSPITAL NO. 3, Appellants, v. COLE
COUNTY.

Division Two, October 9, 1917.

1. **INSANE PATIENT:** County Charge. A state hospital makes out a *prima-facie* case for a claim against the county by showing that

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the patient had entered the hospital as a county patient and that the charges for a definite subsequent period had not been paid.

2. ____: ____: Inheritance of Estate: Notice to State Hospital: Evidence That Notice Was Received. Where the county court made an order reciting that a certain person, theretofore confined in a state hospital as a county patient, had become possessed of an estate sufficient to support himself and family, that the probate court had appointed a guardian to take charge of his person and estate, and ordering that such person be no longer a charge upon the county, a transmission of that order to the hospital, in the manner prescribed by Sec. 1429, R. S. 1909, bars the right of the hospital board to recover from the county for the keep of said patient thereafter; and testimony by the deputy county clerk that on the same or the next day after the order was made he made a certified copy of it, inclosed it in an envelope with the county clerk's return address thereon, sealed it, directed it to the superintendent of the hospital, and mailed it, and that he had a specific recollection of mailing the particular document, is positive evidence that the order was received by the hospital, and sufficient to raise a *prima-facie* presumption that the superintendent received the copy so sent, and to submit that issue to the jury.
3. ____: ____: ____: Instruction: Changing "Deposited With" to "Transmitted To:" Definition. The court did not err in changing the words "deposited with" to "transmitted to" in the instruction asked by the hospital, directing the jury that although they might find from the evidence that the county court made the order transferring the insane patient from a county charge to a pay patient, yet, unless they should further find that a certified copy of the order was "deposited with" the superintendent of the hospital, the verdict should be for it. The statute requires the clerk to "transmit" the certificate to the superintendent, and that duty is discharged when the order is duly mailed in an envelope and addressed to the proper party. That is the meaning of "transmit," while "deposit with" is not synonymous with "filing," but means something more than "to deliver" and something different.
4. ____: ____: ____: ____: That Notice Was Received. The appellant hospital cannot complain that the jury was not required in terms to find that the order of the county court transferring an insane person theretofore kept at the hospital as a county charge to a pay patient, was actually received by the hospital authorities, where the word "received" was contained in no instruction asked, and the theory of appellant's instruction on which the issue went to the jury was that the proper mailing of the order was a *prima-facie* presumption that it was duly received.

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Appeal from Cole Circuit Court.—*Hon. John M. Williams*, Judge.

AFFIRMED.

Lee B. Ewing and Irwin & Peters for appellants.

(1) The appellants made a prima-facie case by showing that Raithel had been an inmate of State Hospital No. 3, as county charge of Cole County, since January 1, 1889, and by introducing the certified copy of the account sued on. R. S. 1909, secs. 1389, 1429. (2) Appellants having shown that Raithel had long been maintained by Cole County at State Hospital No. 3, that county could only relieve itself from payment for his care by showing that its county court had made an order transferring him to a pay patient, and that a certified copy of this order was lodged with the hospital superintendent. R. S. 1909, sec. 1429. (3) There could be no presumption that the certified copy of the order of the county court of Cole County was received by the superintendent until it was first shown that the certified copy was placed in an envelope, properly addressed, bearing sufficient postage, and then deposited in the postoffice. *Sills v. Burge*, 141 Mo. App. 148; *Grain Co. v. Railway*, 120 Mo. App. 203; *Goucher v. Novelty Co.*, 116 Mo. App. 99; *Best v. Ins. Co.*, 68 Mo. App. 598; *Welsh v. Fund Soc.*, 81 Mo. App. 30; 22 Am. & Eng. Ency. Law (2 Ed.), p. 1255. (4) Any presumption arising of receipt of a letter deposited in postoffice, properly addressed, bearing sufficient postage, is overcome by testimony of addressee that the letter was not received. 22 Am. & Eng. Ency. Law (2 Ed.), pp. 1255-56; *Morton v. Morton*, 16 Colo. 358. (5) There can be no presumption that a letter was received by the mere proof that it was mailed, i. e., dropped in the postoffice. To do this would be to base this presumption upon another presumption, i. e., that the letter was properly addressed, and bore sufficient postage. *Yarnell v. Railway*, 113 Mo. 580; *State v. Lackland*, 136 Mo.

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32; Bigelow v. St. Ry. Co., 48 Mo. App. 371; Glick v. Railway, 57 Mo. App. 104; Button Co. v. Shirt Co., 140 Mo. App. 382; Haynie v. Pkg. Co., 126 Mo. App. 92; Moore v. Renick, 95 Mo. App. 95; 22 Am. & Eng. Ency. Law (2 Ed.), p. 1236. (6) Appellants' peremptory instruction should have been given at close of defendant's case, also at close of the whole case. Moore v. Railway, 28 Mo. App. 622; Haynie v. Packing Co., 126 Mo. App. 88. (7) Appellants' Instructions "C" and "D" should have been given in the form asked. Webster's Dictionary; 4 Encyclopaedic Dictionary, p. 4794; R. S. 1909, sec. 1429.

D. F. Calfee and J. H. Lay for respondent.

When a letter is properly addressed and mailed, with postage prepaid, there is a rebuttable presumption of fact that it was received by the addressee as soon as it could be transmitted to him in the usual course of the mails. 16 Cyc. 1065; McFarland v. Accident Assn., 124 Mo. 204; Bank v. Latimer, 64 Mo. App. 321. Presumption of receipt of a letter by mail is strengthened—"becomes well-nigh conclusive"—where the letter bears a return request and is not returned to the sender. 16 Cyc. 1066-1071.

WHITE, C.—The plaintiffs brought this suit against Cole County, on account, for the maintenance of one John Raithel, insane, at State Hospital No. 3, from September 1, 1908, to September 17, 1910. After Raithel had been kept there some years as a county patient at the expense of Cole County, on October 2, 1907, an order was made by the county court of Cole County directing the clerk to notify the superintendent of State Hospital No. 3 that said Raithel was possessed of an estate and would be kept no longer at the hospital at the expense of the county. This order was not transmitted to the hospital authorities. On July 15, 1908, another order was made in the matter which recited that John Raithel had become possessed of an estate sufficient to support himself and family, and

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upon notice thereof the probate court of Cole County had appointed a guardian to take charge of his person and estate; it was therefore ordered that said Raithel be no longer a charge upon said county and that his charge be transferred to his guardian so appointed, and that the superintendent of State Hospital No. 3 be so notified.

The only question of fact at issue is whether this last mentioned order was transmitted to State Hospital No. 3 at Nevada, Missouri, in accordance with requirement of Section 1429, Revised Statutes 1909. It is conceded by appellants that if it was received by the hospital authorities in due time then the maintenance of Raithel ceased to be a charge upon Cole County after September 1, 1908, and the county is not liable. The trial was by jury and the verdict for defendant.

I. Error is assigned to the action of the trial court in refusing to give a peremptory instruction directing a verdict for plaintiff. It is claimed there <sup>Order of
County Court:</sup> was no evidence to show the order mentioned was received by the hospital superintendent. <sup>Transmission
to Hospital.</sup>

The plaintiffs first made out their prima-facie case by showing that the patient entered the hospital as a county patient. The defendant introduced the order of July 15, 1908, and then introduced Dr. O. L. Moore, who was deputy county clerk of Cole County at the time the said order was made. He testified that either the same day or the next day after the order was entered he made a certified copy of it and mailed it, in the county official envelope with the county clerk's return address on the envelope, to the superintendent of the institution at Nevada, Missouri; that he had a specific recollection of mailing the particular document; that he recollects it because there had been a question as to whether he had sent a copy of the first order made in 1907, and to be on the safe side the second order was made in 1908. He said he was positive he made a copy of the order and put it in an envelope, "sealing it and stamping it and putting it in the post office." It was further shown by defendant

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that the guardian of Raithel, on June 10, 1908, paid Hospital No. 3 the sum of \$67 on account of the care of Raithel.

The evidence made out a *prima-facie* case of delivery. The testimony of Moore was sufficient to raise the *prima-facie* presumption that the addressee, the superintendent of State Hospital for the Insane, No. 3, at Nevada, Missouri, received the copy so sent, and to submit that issue to the jury. [Covell v. Western Union Telegraph Co., 164 Mo. App. l. c. 635; McFarland v. Accident Assn., 124 Mo. l. c. 219; Sills v. Burge, 141 Mo. App. l. c. 154; Grain Co. v. Mo. Pac. Ry. Co., 120 Mo. App. l. c. 210; Edwards v. Miss. Valley Ins. Co., 1 Mo. App. l. c. 198; Cromwell v. Phoenix Ins. Co., 47 Mo. App. l. c. 111.]

This presumption was rebuttable and the plaintiffs introduced evidence tending to rebut it. However, the jury found the fact in favor of the defendant and the evidence was sufficient to sustain the finding.

II. Complaint is made by the appellants of the refusal of the court to give two instructions, "C" and "D," as asked by them, and of the court's action in modifying them. These instructions directed the jury that although they might find from the evidence that the county court of Cole County made the order of transfer, yet, unless the jury should further find that a certified copy of the order "*was deposited with*" the superintendent of said Hospital No. 3, the verdict should be for the plaintiff. The trial court modified the instructions by erasing the words "*was deposited with*" and inserting the words "*was transmitted to*." It is claimed that the instructions so modified did not require the jury to find that the order was actually received by the hospital authorities. The court in modifying the instructions simply used the language of the statute, Section 1429, which says:

"If the county court of the proper county shall so order, the clerk thereof *shall transmit* to the superintendent a certificate, under his official seal, setting forth that any county patient in the state hospital from his county has sufficient estate to support and maintain him at the

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hospital. After the receipt of this certificate the patient shall be a pay patient," etc.

The duty of the clerk of the county court is set out in the use of the word "transmit." As the word is defined, that duty is discharged when it is shown that the order was duly mailed in an envelope stamped and addressed to the proper party. The receipt of the order is then *prima-facie* presumed. Such is the meaning attached by the authorities to the word "transmit." [Stanton v. Kline, 11 N. Y. 196; Davies v. Newcastle & L. Ry. Co., 71 Ohio St. 325.] The words used in the instruction as asked, "was deposited with," have a significance beyond the duty required of the county authorities. To deposit is not synonymous with "filing." [People v. Peck, 22 N. Y. Supp. 576, l. c. 583; United States v. Van Duzee, 185 U. S. 278, 46 L. Ed. 909, l. c. 910.] "To deposit" means something more than "to deliver" and something different. [Staniels v. Raymond, 58 Mass. 314, l. c. 316; Toler v. White, 24 Fed. Cases, 3-5.]

Counsel for the appellants complain that the jury should have been required in terms to find that the order was actually "received" by the hospital authorities. The appellant asked no instruction requiring a finding in that form; the word "received" was not used in any instruction asked. The plaintiffs asked an instruction, which was given, to the effect that unless the jury should find that a certified copy of the order was deposited in the United States mail, bearing the proper address of the superintendent of the State Hospital No. 3 at Nevada, Missouri, and bearing the required amount of postage to carry said copy to its destination, the verdict should be for the plaintiffs. Thus the theory of plaintiffs on which the issue went to the jury was that the proper mailing was a *prima-facie* presumption of the receipt of the document. That instruction, together with the instructions requiring the jury to find the order was "transmitted," in the absence of any request by the plaintiffs for further qualifying or specific instruction relating to the actual delivery and receipt

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of the order, was entirely sufficient to submit to the jury the issue as to whether the order was received.

Finding no error in the record the judgment is affirmed.

Roy, C., concurs.

PER CURIAM: The foregoing opinion by *White, C.*, is adopted as the opinion of the court. All of the judges concur.

WILLIAM BEARD, Appellant, v. MISSOURI PACIFIC RAILWAY COMPANY.

Division Two, October 9, 1917.

1. NEGLIGENCE: Pedestrian on Track: Evidence of Signals at Crossing. Where defendant's unfenced spur track ran through a thickly settled community, and the use of the track by pedestrians had been acquiesced in for years by defendant, and its trains were run over the track not for public convenience but at irregular intervals in hauling coal, evidence that no bell was rung or whistle sounded just before or at the time of backing the loaded cars over the track on which the deceased was walking when struck, is competent, and is not to be excluded on the theory that the statutory duty to give such signals at a road crossing does not pertain to a pedestrian on a track 150 feet from a public crossing.
2. _____: _____: _____: Instruction: Anticipating Pedestrian on Track. It being the duty of the railroad company to ring the bell or sound the whistle when it approached that portion of its track used for travel by pedestrians, it was error to instruct the jury that their verdict must be for defendant unless the trainmen saw or by the exercise of ordinary care could have seen the deceased in a position of peril and thereafter failed to stop the train in time to avoid striking him, especially when the facts point to the conclusion that the failure to give either of the signals tended to cause the injury. That neither of the trainmen saw the deceased did not lessen the duty to give one or the other signal.
3. _____: Instruction: Based on Conjecture: Climbing on Car. The giving of an instruction which attempts by inference based on conjecture to define the limit of defendant's liability is error. To tell the jury that their verdict must be for defendant if the deceased fell or was thrown under a moving train in an attempt

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to climb on the cars, where there is no testimony from which the conclusion can reasonably be drawn that he made such an attempt, is error.

4. ____: ____: **Result of Mere Accident.** Where the injury was caused either by the negligence of defendant or that and the contributory negligence of deceased, an instruction that if the injury was the result of a mere accident plaintiff cannot recover, should not be given.
5. ____: ____: **Trespasser.** The deceased was not a trespasser when struck by defendant's train while walking on a portion of its track which ran through a thickly settled community and was much used as a pathway by pedestrians with defendant's acquiescence; and an instruction limiting defendant's liability on the assumption of trespass was erroneous.
6. ____: **Ordinary Care: Lookout on Rear of Backing Train.** In backing a long train of cars over a portion of its track on which pedestrians had a right to be and frequently traveled, ordinary care requires that a railroad company place some one on the last car to look out for such persons.

Appeal from Saline Circuit Court.—*Hon. Samuel Davis, Judge.*

REVERSED AND REMANDED.

Charles Lyons, Carl L. Ristine and Reynolds & James for appellant.

(1) The court erred in refusing to permit the plaintiff to prove that the defendant neglected and failed to ring the bell or sound the whistle in order to warn the deceased of the near and dangerous approach of its train, because in this case its servants in charge of its train had no right to expect a clear track at the place where deceased was killed and it was their duty to see deceased and warn him by the use of the bell and the whistle. *Reyburn v. Railroad*, 187 Mo. 572; *Morgan v. Wabash Ry. Co.*, 159 Mo. 283; *Hinzeman v. Railroad*, 199 Mo. 64; *Hinzeman v. Railroad*, 182 Mo. 626; *Feldman v. Railroad*, 175 Mo. App. 637; *Walker v. Wabash Ry. Co.*, 193 Mo. App. 270. (2) The court erred in giving instruction numbered 2 on behalf of the defendant, because it limited the duty of the defend-

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ant to the sole proposition of whether or not the train could have been stopped in time to avoid striking deceased, and leaves out entirely the duty to warn deceased by ringing the bell and sounding the whistle, and injects a matter into the case without evidence to support it, namely, whether deceased was attempting to climb onto the train. Rashall v. Railroad, 249 Mo. 521, and cases cited above. (3) The court erred in giving instruction numbered 3 on behalf of the defendant, because it disregarded all of plaintiff's evidence of negligence and left the matter of what constituted an accident to the conjecture and speculation of the jurors. Simon v. Met. St. Ry. Co., 178 S. W. 450; Wise v. Transit Co., 198 Mo. 559; Beave v. Transit Co., 212 Mo. 355; Felver v. Railroad, 216 Mo. 209; Zeis v. Railroad, 205 Mo. 650; Lagarce v. Railroad, 183 Mo. App. 86. (4) The court erred in giving instruction numbered 4 on behalf of the defendant, because there was no evidence upon which to base said instruction, and it invited the jury to speculate and draw upon their imagination in determining the issues in the case. Degonia v. Railroad, 224 Mo. 588; State ex rel. v. Morrison, 244 Mo. 211; Simon v. Met. St. Ry. Co., 178 S. W. 450; Feldman v. Railroad, 175 Mo. App. 639; Small v. Ice Co., 179 Mo. App. 464; Scott v. Smelting Co., 187 Mo. App. 359; Kinney v. Nat. Newspaper Assn., 193 Mo. App. 343. (5) The court erred in giving instruction numbered 6 on behalf of the defendant, because it required the deceased to make all possible precautions for his safety, and eliminated the gist of this kind of an action, namely, that even though the injured party was negligent, defendant is nevertheless responsible for the hurt, because it could have avoided the injury entirely by exercising ordinary care and failed to do so. Rashall v. Railroad, 249 Mo. 521; Reyburn v. Railroad, 187 Mo. 573; Degonia v. Railroad, 224 Mo. 564; Gabal v. Railroad, 251 Mo. 257; Dutcher v. Railroad, 241 Mo. l. c. 164; Morgan v. Railroad, 159 Mo. 262; Walker v. Railroad, 193 Mo. App. 249; Feldman v. Railroad, 175 Mo. App. 629.

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Edward J. White, James F. Green and Harvey C. Clark for respondent.

(1) The testimony offered by the plaintiff on failure of the defendant to ring the bell or sound the whistle was properly excluded, because: (a) The defendant stood upon the proposition that the deceased was not upon the track at all, and it was admitted that no signals were given and no effort to stop was made. This was pleaded in the answer, announced to the jury in the opening statement of counsel, appears throughout the record and defendant's witnesses so testified. (b) The questions of insufficient warning or of the engineer relying upon the deceased to step aside in due time, or of the ability of the engineer to stop the train, are not in the case. The respondent defended on the ground that deceased was not on the track at all and the cases cited by appellant have no application. (c) Appellant was not prejudiced by such refusal because the court gave his instruction Number 3 telling the jury it was the duty of the defendant to whistle and ring, and appellant's counsel were permitted to discuss the matter before the jury and to allude to the fact the defendant failed to give any warning whatever of the approach of its train. (d) The issue before the jury was square-cut as to whether deceased was on the track at all; this was the only issue. (e) The testimony offered by plaintiff and refused by the court relating to failure to ring and whistle at the Midway Mine a quarter of a mile south of scene of the accident was too remote. (f) It was not alleged or proven that the deceased was killed at a crossing, and hence the crossing cases cited by appellant have no application.

(2) Defendant's Instruction Number 2 on the burden of proof and authorizing a verdict for the defendant if the jury was unable to determine the manner in which the deceased met his death is predicated on the evidence, does not purport to cover the whole case and incorporates all the elements necessary.

(a) The physical facts and circumstances and defend-

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ant's testimony indicated that the deceased met his death while attempting to climb on the train. (b) The issue of fact in this case was whether the deceased was or was not on the track. From appellant's stand-point defendant's negligence consisted in not seeing deceased, not in failing to warn him after he was seen. Defendant denied deceased was on the track at all. (c) This instruction applied the facts to the law from defendant's standpoint and should be considered in connection with plaintiff's instructions numbered 2 and 3. (d) Plaintiff's instruction numbered 3 presents appellant's theory on failure to give warning signals and he had the advantage of same before the jury notwithstanding there was no evidence to support it. (e) This instruction does not purport to cover the whole case, hence need not refer to failure to give signals, even if the evidence showed such failure and it was material. (3) Defendant's Instruction Number 3 submitting the question of a mere accident was proper under the facts in this case, and appellant was not injured thereby. Simon v. Met. St. Ry., 178 S. W. 449; Sawyer v. Railroad, 37 Mo. 262; Henry v. Grand Ave. Ry. Co., 113 Mo. 525; Beauvais v. St. Louis, 169 Mo. 500; Feary v. Railway, 162 Mo. 99. (4) The defendant's demurrer at the close of all the testimony should have been sustained. A verdict will not be set aside because of erroneous instructions or on account of errors in admitting testimony if on the whole record the verdict was for the right party. Bartley v. Street Ry., 148 Mo. 143; Baustian v. Young, 152 Mo. 325; Homuth v. Street Ry., 129 Mo. 643; Kelly v. Railway, 153 Mo. App. 114.

WALKER, P. J.—This is an action brought by an administrator for damages for the death of one Arthur Beard, alleged to have been caused by the negligence of the defendant. The cause of action arose in Lafayette County, where the suit was instituted, but upon a change of venue it was tried in Saline County, resulting in a majority verdict for defendant, from which plaintiff appealed.

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The deceased was killed February 28, 1913, by being struck by a loaded coal car; it was one of ten of a like character then being pushed or backed along a spur track by one of defendant's engines. This engine was narrower than its tender, which was between the engine and the cars, and was also loaded with coal, as were the cars for about a foot or more above the top of each. The length of the train, exclusive of the engine, was about 500 feet. No one saw the car strike deceased, but the facts adduced in evidence, accompanied by the attending circumstances, sustained the conclusion that the deceased was at the time walking in the middle of the track with his back to the train when the engine backed the cars down on him and killed him. There was no one at the end of the last car from the engine at the time. One of the brakemen had a few minutes before been left at a switch. The conductor had gone into the mine office near the track to get the coal billing. The other brakeman was setting the brakes on the ninth and tenth cars from the engine and as he says at the same time "looking straight down the track" when he dropped off 200 feet south of where the deceased was struck and was not aware of it until after he had gotten down on the ground and saw a miner's bucket roll out from under the cars.

The spur track upon which the killing occurred had been built and was then being used by defendant to connect its main line with certain coal mines located about two and one-half miles south of the city of Lexington. The deceased was a miner and was en route from the mines to his home when killed. The tracks run north and south at the place where the killing occurred. About 200 feet south of where the body of the deceased was found a public road crossed the tracks. No bell was rung or whistle blown when the train crossed this road. Seventy-five feet further south the switch or spur track leaves the main track in a southeasterly direction. The train before backing down upon the deceased, stopped just north of the divergence of the switch track from the main line. Many miners and others lived in the immediate neighborhood. In the middle of the spur track there was a beaten path-

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way which for years had been used, with defendant's knowledge and without its protest, by pedestrians. Miners used it in going to and from their work; women used it in going to and from Lexington and other parts of the neighborhood; and children used it in going to and from school and for other purposes. So general was this use that a former employee of the defendant, a conductor, stated that when he ran a train over this spur it was often necessary to whistle to get women and children off the track; and that this pathway had been thus used ever since the spur track was put in. This use is explained by the fact that the smooth surface between the rails afforded a better place for walking than on either side where the ground was rough and sloped abruptly from the ends of the ties.

It was snowing and the wind was blowing from the north at the time of the killing. The last time the deceased was seen alive was four or five minutes before he was killed; he had just left the mine where he had been at work and was walking with his dinner bucket in his hand in a northerly direction in the middle of the spur track. Persons who first arrived upon the scene saw the tracks of one person between the rails in the snow leading northward from the public crossing to the place where deceased was struck; this place was located by the tracks of the person terminating abruptly, followed by marks in the snow as though a body had been pushed along from that point with the toes dragging on the ground. Following this the snow had been rubbed off of the west rail, and from thence to where the body was found the rail was smeared with blood and pieces of flesh for a distance of about 120 feet. Witnesses for the plaintiff testified a specifically in regard to this phase of the case as follows: "We found his tracks right there where he had been walking down the middle of the track right between the rails. We noticed where he was struck. We could tell from his toe prints where the train hit him. The train just raised him up and dragged him along for about ten feet and there were no marks at all after that until where he hit the rail on the west side. It looked there like somebody had been drug and then on the first joint was where the flesh and

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blood was torn off; and further on it was torn off all the way. The distance the body had been dragged was about four rails. They were thirty-foot rails. When we went back to make the examination there was just one track between the rails and our tracks on each side where we had walked down to him."

This rule of the defendant was introduced in evidence: "102. Where cars are pushed by an engine (except when shifting and making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need."

The theory of the defense is that the deceased was not walking between the tracks when killed, but that he was outside of the rails, and the inference deduced, in the absence of testimony, from the statements of the engineer and brakeman, because they state they did not see him, is that he was not struck while walking between the rails, but while on one side of the track in an attempt to climb on one of the cars. The testimony of the engineer in this regard is that he was sitting in the cab of the engine when the accident occurred and in looking out over the ten cars he could see fifty or seventy-five feet ahead of the last car but saw nothing on the track. The brakeman, who was at the time on the ground going back towards the engine, also says he saw nothing on the track. His testimony in this regard is contradicted by a witness for the plaintiff who testified that the brakeman told him immediately after the occurrence that he had "seen a man on the track in front of the cars who suddenly disappeared and he didn't see him any more until his dinner bucket rolled out and he looked and saw his body on the track."

The conductor, who was apprised of the killing by the brakeman after the latter had jumped from the train, stated on direct examination that he noticed at the crossing where a man had come off of the side of the road and started down on the outside of the track; that these tracks extended down about 150 feet from the crossing where they turned in directly towards the track. There the snow was raked off of the outside of the rail for about fifty feet from where the body of the deceased was

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found on the ties next to the rail; that the wheels of but one car and one pair of trucks of another car had passed over the body. A former statement of this witness, taken under oath soon after the occurrence, was introduced, wherein he stated that he had examined the cars to see if there was blood on them and that he found blood on the tenth or last car from the engine and that six cars and one pair of trucks had passed over the body.

A synopsis of the pleadings will enable the issues submitted to be more readily understood.

Following the usual formal allegations necessary in a case of this character the petition alleges the frequent use by pedestrians of the spur track on which the killing occurred, defendant's consent to such use, the negligent killing of the deceased by the backing of defendant's cars down upon him while he was walking northward on the track unaware of the approach of the train; that through the exercise of ordinary care on the part of the defendant's employees operating the train they could have become aware of the presence of the deceased on the track and have thus averted striking and killing him; that they negligently failed thus to do and thereby caused his death; that they failed to sound the usual or ordinary signals in time to avert the killing of the deceased in that they did not at any time sound the whistle or ring the bell or give any other signal by which the deceased might have been warned of the near and dangerous approach of the train; and that they failed to have stationed at the front end of the foremost car going northward on said train at the time of the killing a brakeman or switchman to be on the lookout for persons on the track so that the engineer, thus informed, might have been enabled by stopping said train to have averted injury to persons on the track as required by the rules of said company, and that the train was not equipped with air-brakes connecting the cars with the engine with a whistle attached so that the train might be stopped in time to avert injury to persons on the track; that the train was not being operated with a sufficient crew as required by law and by reason of its negligent and careless operation by defendant's employees and their failure to comply with defendant's own rules and

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the laws of the State the death of the deceased was caused. Following this is the usual prayer.

After a general denial the answer avers that the deceased went upon defendant's property as a trespasser and that his death was due solely to his own negligence in so doing; and that he disregarded his own safety by placing himself in a position of peril with reference to defendant's moving train where he well knew he was in great danger of being injured and killed, all without the knowledge or negligence of the defendant; that the death of the deceased, who was at the time a trespasser, was the result of his own negligence in placing himself in dangerous proximity to defendant's moving train, as defendant avers and believes, in his attempting to climb upon said moving train without the knowledge and consent of the defendant and without negligence on its part. This is followed by counts alleging the unconstitutionality of Section 5425, Revised Statutes 1909, not here insisted upon as error.

The reply was a general denial.

The instructions given at the instance of defendant, of which complaint is made, are as follows:

"2. The court instructs the jury that the burden is on the plaintiff to make out his case to your reasonable satisfaction by a preponderance of the evidence. And if you are unable to determine from the testimony and all the facts and circumstances in evidence whether the deceased, Arthur Beard, was struck by the defendant's train while walking on the track, and that the defendant's employees saw, or by the exercise of ordinary care, could have seen him, and that they discovered or by the exercise of ordinary care could have discovered that he did not intend to step aside before the train struck him, and after discovering that he did not intend to so step aside, could have stopped the train in time to avoid striking him, or whether he fell or was thrown under the train while attempting to climb thereon, then your verdict must be for the defendant.

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"3. The court instructs the jury that if you find and believe from the evidence the death of Arthur Beard was the result of mere accident, then your verdict must be for the defendant.

"4. The court instructs the jury that if you believe and find from the evidence that the deceased, Arthur Beard, attempted to climb upon the defendant's train for the purpose of riding thereon, and that in doing so he fell or was thrown under the wheels of the same and killed, then your verdict must be for the defendant.

"6. The court instructs the jury that there is no liability on the part of the railroad company from the mere fact, if you find it to be a fact, that one of its cars struck the deceased while he was walking on defendant's track, nor is there any presumption that the defendant or its employees were guilty of any negligence because of the fact that the deceased was struck by one of its cars, for it was the duty of the deceased to look for approaching trains and to take all possible precautions for his own safety."

I. Error is assigned in the exclusion of testimony as to whether the bell was rung or the whistle sounded just before and at the time of backing the loaded coal cars over the right-of-way where the deceased was killed. It will be recalled that 150 feet south of where the killing occurred there was a public crossing over defendant's track, and the trial court, acting evidently upon the theory in the exclusion of the proffered testimony that it should be limited in behalf of persons about to use, using or who had just used this crossing, held, under a number of authorities here and elsewhere (*Stillson v. Railroad*, 67 Mo. 677; *Bell v. Railroad*, 72 Mo. l. c. 58; *Dahlstrom v. Railroad*, 96 Mo. 101; *Burger v. Railroad*, 112 Mo. 246; *Everett v. Great Northern Ry. Co.*, 100 Minn. 309; *Randall v. Railroad*, 109 U. S. 478; *Gibson v. Leonard*, 143 Ill. 182, 17 L. R. A. 588), that the testimony was inadmissible. From the above citations we have excluded those in which the injured party was an employee of the defendant.

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If the defendant's negligence which caused the injury had been predicated upon its failure to give one of the signals required by the statute (Sec. 3140, R. S. 1909) at the crossing, the exclusion of the testimony would have been authorized under the cases cited. The defendant, in the absence of any modifying facts, would have had the right to expect a clear track except at or near the crossing, and the deceased under such circumstances if injured elsewhere would have been entitled only to those rights accorded by law to a trespasser, viz., freedom from wanton or wilful injury by the employees of the defendant if they knew of his presence or after discovery of same could by the exercise of ordinary care and prudence have avoided injuring him. [Frye v. Railroad, 200 Mo. l. c. 405; Barker v. Hannibal & St. Joseph Ry. Co., 98 Mo. l. c. 53.]

Modifying facts, however, impose a duty upon the defendant in addition to that required by the statute (Sec. 3140). While the defendant's track did not at the point where the deceased was injured run through a town, the vicinity was thickly settled on each side of the road and like physical reasons existed for the giving of such signals as are necessary in a city or town; there was no fence enclosing the right-of-way and the use of the middle of the track each day by hundreds of pedestrians had been acquiesced in for years by the defendant. The track was a switch or a spur, not a part of the main line. It was used incidentally for the public convenience but principally to enable the defendant to transport coal from the mines to its main line. Trains did not run over this spur at regular intervals and hence the public could not know when the track would be occupied. The infrequent operation of trains thereon naturally lessened the apprehension of danger which otherwise might have been felt by persons using the track as a footpath and as a consequence rendered its use for that purpose more general. None of the convincing facts existed which would have authorized the defendant to expect a clear track as the same is defined

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by LAMM, J., speaking for this court in *Frye v. Railroad*, *supra*. It could not, therefore, have been presumed that such a condition existed.

The acquiescence of the defendant for years in the use of its track by pedestrians raised the presumption that the operatives of its train knew of such use at the point where the deceased was killed. He was, therefore, not to be regarded as a trespasser in so using the track and the defendant owed him the duty of exercising every reasonable precaution to avoid injuring him. [*Frye v. Railroad*, 200 Mo. 377, 98 S. W. 566, 8 L. R. A. (N. S.) 1069; *Ahnefeld v. Wabash Ry. Co.*, 212 Mo. 280, 111 S. W. 95; *Eppstein v. Mo. Pac. Ry. Co.*, 197 Mo. 720, 94 S. W. 967; *Hufft v. Railroad*, 222 Mo. 286, 121 S. W. 120; *Cotner v. Railroad*, 220 Mo. 284; *Burger v. Railroad*, 112 Mo. 246.] One of these precautions, in addition to keeping a lookout for his presence on the track, was that it use the resonant warnings, to-wit, the bell or whistle, with which its engines are equipped. There was no defect in any of the physical senses of the deceased. Walking away from the train he could not see it; but being only 150 feet distant from the point where the train ran upon the track most used by pedestrians, if either the bell had been rung or the whistle sounded it is reasonable to conclude that he would have heard it and this calamity would have been averted. Testimony, therefore, as to whether or not this precaution was used is relevant to determine if the defendant was in this regard negligent; the trial court, therefore, erred in its exclusion.

II. The giving of instruction numbered 2 at the instance of the defendant is assigned as error. It directs a verdict for defendant unless its employees saw or by **Instruction.** the exercise of ordinary care could have seen the deceased in a position of peril and after discovering that he did not intend to leave the track they could have stopped the train in time to have avoided injuring him, or if he fell or was thrown under the train in an attempt to climb on the cars. It was incumbent up-

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on the defendant to use every reasonable precaution in approaching the frequently used portion of its track to avoid injury to anyone who might be thereon. One of these precautions was that the bell should be rung or the whistle sounded. A statement of this prerequisite to free the defendant from negligence and its consequent liability is absent in this instruction. We held in *Morgan v. Wabash Ry. Co.*, 159 Mo. 262, that it was the duty of the engineer to give such warning signals at hand as the situation reasonably demanded. If it was necessary as one of the conditions to free the defendant from negligence that the bell be rung or the whistle sounded upon approaching the frequently used portion of its track, then it was equally necessary that this duty be defined in the instruction as one of the conditions to defendant's freedom from liability. This is especially true where, as in this case, the facts point forcibly to the conclusion that the failure to give one or the other of these signals tended to cause the injury. [*Hinzeman v. Railroad*, 182 Mo. l. c. 625.]

When the Hinzeman case was here on a second appeal (199 Mo. l. c. 64), in discussing the duty devolving on a defendant to use every reasonable preeaution to avoid an injury, we said that an instruction was erroneous which limited the duty of the defendant in the emergency named to stopping the train, and if the peril was discovered too late to accomplish this end the defendant was not liable. This we held left out of view the sounding of the whistle, which under the plain evidence was an obvious duty. Its use under such circumstances is emphasized in the holding that the ringing of the bell alone may not suffice. It is true in the instant case that the conductor and brakeman state that they did not see the deceased before he was struck, but the fact of their failure to see him did not lessen their duty to use every reasonable precaution to prevent injury to anyone who might be upon this frequently used portion of the track. Under such circumstances the failure to ring the bell or sound the whistle was negligence and it was proper that the jury be so instructed.

There is no evidence either by express testimony or the presence of any circumstances from which the conclusion can be reasonably drawn that the deceased attempted to climb on the cars. The only testimony from which even an inference of this fact can be drawn is the statement of the conductor that he saw some tracks on the outside of the rail leading down to the point where the deceased was struck, which turned into the middle of the track. The only effort made to support this conjecture, for it is nothing more, first that these were the tracks of the deceased and second that he attempted to climb on one of the cars, was the statement of this same witness, expressly contradicted by him in a former sworn statement and by all of the other testimony, that there was no blood on the front car. From this the inference is sought to be drawn that the deceased was killed in an effort to climb on the third or fourth car. The latitude of our procedure, ample as is its extent, has never reached the point where it will authorize the giving of an instruction which attempts through the medium of an inference based on conjecture to define the limit of a defendant's liability in a case of this character. The assumption, therefore, that the death of the deceased was caused by his attempting to climb on the cars was without foundation and the instruction was in this respect erroneous.

Instruction numbered 3, given at the instance of the defendant, is also assigned as error. Under a proper state of facts an instruction is proper which authorizes an acquittal if the jury believe that the injuries sustained were the result of mere accident. Some of the cases cited by defendant in this regard are of this character, others are to the contrary. Where, as in the instant case, the death of the deceased was caused either by the negligence of the defendant or by that and the contributory negligence of the deceased, there is no authority for the giving of this instruction. [Simon v. Railway Co., 178 S. W. 449.] In this case Roy, C., carefully reviews the cases pro and con on this subject.

Defendant's instruction numbered 4 is erroneous for the same reason which led to the condemnation of the

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latter part of instruction numbered 3, viz., that there was no testimony on which to base the hypothesis that the deceased was attempting to climb on one of the cars at the time he was killed.

Instruction numbered 6, given at the instance of the defendant, is erroneously based upon the assumption that the deceased was a trespasser at the time he was killed and the liability of the defendant is as a consequence improperly limited.

In view of what has been said it is not necessary to discuss the question as to whether the defendant was negligent in not having some one on the lookout on the last car of the train during the entire time that the train was backing over the frequently used portion of its track. This would have been not only in conformity with defendant's own rule, but the employment of ordinary care not shown to have been exercised when only one brakeman was on the rear end of the front car setting brakes until a short time before the deceased was struck, when he, the brakeman, jumped off to throw a switch or cut out the engine, at which time the deceased was run down and killed.

From all of which it follows that the judgment of the trial court herein should be reversed and remanded that the case may be tried in accordance with this opinion. It is so ordered. All concur; *Faris, J.*, in result.

THE STATE ex rel. N. A. AREL v. JOHN S. FARRINGTON et al., Judges of Springfield Court of Appeals.

Division Two, October 9, 1917.

1. **CERTIORARI TO COURT OF APPEALS:** Conflict of Opinions: Different Conclusions from Similar Facts. Where the facts in a case before the Court of Appeals are so similar to the facts in a case previously decided by the Supreme Court as to require that the same rule of law should be applied to the facts of both cases, the

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Supreme Court will on *certiorari* quash the judgment of the Court of Appeals if the two opinions conflict.

2. — : — : — : Action on Insurance Policy: Fraudulent Representations: Question for Jury. The Supreme Court has not ruled that the fraudulent intent of the insured in making misrepresentations as to the value of the goods insured or the extent of the injury must always be submitted to the jury. The rule is that where the evidence is such that the jury may reach a conclusion one way or the other on the question of fraudulent intent, the case must go to the jury; but where the evidence conclusively shows a fraudulent intent in making the misrepresentations a demurrer to the evidence should be sustained. And whether the Court of Appeals was right or wrong in holding that the insured's evidence conclusively showed fraudulent misrepresentations as to material facts by him, their ruling in that respect was not in conflict with any prior ruling of the Supreme Court, and for that reason cannot be quashed by *certiorari*.

Certiorari.

WRIT QUASHED.

Walker & Musgrave and G. G. Lydy for relator.

(1) The statement claiming damage of \$750 on account of the iron boiler because the laundry plant was rendered useless by the fire, is a mere conclusion from facts known by the insurer through personal inspection by its agents in company with the insured, before the proofs of loss were executed, and did not and could not deceive the insurer. Arel derived and could derive no advantage from it, and the insurance company received and could receive no detriment from it. In any event it is the province of the jury to say whether the statement was the honest assertion of an erroneous claim, or whether it was wilfully made with the purpose to deceive the insurer. The Court of Appeals erred in not so holding, and failed to follow the last controlling decision of this court. Marion v. Ins. Co., 35 Mo. 148; Schulter v. Ins. Co., 62 Mo. 236. The doctrine in Missouri is sustained by the overwhelming weight of authority. The cases are collated in 39 Am. & Eng. Annotated Cases, p. 453. (2) In disposing of a demurrer to the evidence, plaintiff's evidence and his explanation must be taken as true and he is entitled to every legitimate inference therefrom. Thorp v. Met. St. Ry.

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Co., 177 S. W. 851; Peak v. Taubman, 251 Mo. 390. (3) Counsel in advising Arel in preparing his proofs of loss relative to the big iron boiler, relied on the doctrine of the following cases, holding that if the destruction by fire be such as would render the property insured of no value for the purpose for which it was used, then the loss would be regarded total, although there might not be a total extinction of all the parts. Havens v. Fire Ins. Co., 123 Mo. 423; Glase v. Templeton, 184 Mo. App. 532.

John Schmoock and Hogsett & Boyle for respondents.

Plaintiff's evidence conclusively established the fact that Arel swore falsely in the proofs of the loss, which false swearing as a matter of law barred his recovery. (1) False swearing as to one item of loss avoids the entire policy. Hall v. Ins. Co., 106 Mo. App. 476; Hamburg v. Ins. Co., 68 Minn. 335; Fowler v. Ins. Co., 35 Ore. 559; Ins. Co. v. Connelly, 104 Tenn. 93; Richards on Insurance (3 Ed.), p. 316. (2) The testimony of Arel himself conclusively and without contradiction proves that he intentionally swore the boiler was a total loss when he positively knew it had suffered no damage whatever. (3) False swearing consists in knowingly and intentionally stating upon oath what is not true, or the statement of a fact as true which the party does not know to be true and which he has no reasonable ground for believing to be true. 19 Cyc. 855; Atherton v. Assurance Co., 92 Me. 289; Linscott v. Ins. Co., 88 Me. 497, 51 Am. St. 435. (4) Arel swore he had sustained a total loss on the boiler, which was not true, and he knew it was not true, and he had no reasonable ground for believing it to be true. (5) The question of fraud or no fraud is a matter of law for the court, not a question for the jury, when the facts relating thereto are conceded and uncontested and show a case so plain that reasonable minds could not differ concerning it. Gee v. Drug Co., 105 Mo. App. 34; Marble Co. v. Achuff, 83 Mo. App. 47; Mathews v. Loth, 45 Mo. App. 459; Frankenthal v. Goldstein, 44 Mo. App. 191. (6) It is not only the right, but the positive duty of the trial court, to direct a

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verdict for the defendant where the undisputed facts show no liability. Gilmore v. M. B. A., 186 Mo. App. 455; May v. Crawford, 150 Mo. 83; Powell v. Railway, 76 Mo. 83; Gee v. Drug Co., 105 Mo. App. 27; Carter-Montgomery Co. v. Steele, 83 Mo. App. 215. (7) When fraud is once established, and the necessary consequence of such fraud is to deceive and defraud someone else, the law will conclusively presume a fraudulent intent. This on the ground that a party must be presumed to have foreseen and intended the necessary consequences of his own act. Snyder v. Free, 114 Mo. 376; Bank v. Meyers, 139 Mo. 653; Richards on Insurance (3 Ed.), p. 314. (8) The evidence in the original case established the existence of false swearing as a matter of law, operating as a complete bar to all recovery by Arel. Hall v. Western Underwriters' Assn., 106 Mo. App. 476; Cloak & Suit Co. v. Ins. Co., 141 N. Y. Supp. 553; Richard D'Aigle Co. v. Ins. Co., 136 La. 777; Claflin v. Ins. Co., 110 U. S. 97; Kavooras v. Ins. Co., 167 Ill. App. 220; Rovinsky v. Assurance Co., 100 Me. 112; Sternfield v. Ins. Co., 50 Hun, 262; Ins. Co. v. Vaughn, 88 Va. 832; Vaughn v. Ins. Co., 102 Va. 541; Dohmen v. Ins. Co., 97 Wis. 38; Anibal v. Ins. Co., 82 N. Y. Supp. 600; 4 Cooley's Briefs on Insurance, pp. 3423, 3431; Boynton v. Andrews, 63 N. Y. 93; Moore v. Ins. Co., 28 Gratt. (Va.) 508, 26 Am. Rep. 373; Home Ins. Co. v. Connelly, 104 Tenn. 93. (9) The Court of Appeals' opinion is not in conflict with the decision in Marion v. Great Republic Ins. Co., 35 Mo. 148. The Marion case simply holds that the false statement by the insured, in order to operate as a defense must be (1) an intentional misstatement of a material matter (2) made with the purpose to deceive the insurer. Marion v. Great Republic Ins. Co., 35 Mo. 151. The Court of Appeals' opinion affirmatively finds in the plaintiff's testimony both of these elements. Arel v. Fire Ins. Co., 190 S. W. 78. Arel's own testimony shows that he inserted the false statement of loss in the proof of loss with the intention that the insurance companies should rely thereon, and pay him the insurance money in reliance thereon. Therefore, his own testimony shows that he had an intention to deceive.

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ROY, C.—This is a proceeding by *certiorari* originating in this court, having for its object the quashing of the judgment of the Springfield Court of Appeals in the case of N. A. Arel and the Drovers Bank of Springfield v. First National Fire Insurance Company, reported in 195 Mo. App. 165, and in 190 S. W. 78. This proceeding does not in any way affect the rights of said Bank.

The suit above mentioned was brought on a policy of fire insurance issued to Arel on the machinery and other personal property of a laundry owned and operated by him in the city of Springfield, subject to a chattel mortgage to said bank.

That policy contained the usual provisions avoiding it in case the insured had concealed or misrepresented any material fact concerning said insurance or the subject thereof, or in case of any fraud or false swearing by the insured touching any matter relating to said insurance or the subject thereof, whether before or after a loss.

The answer contained a general denial, set out the above provisions of the policy, and alleged that Arel had been guilty of making false and fraudulent misrepresentations to the defendant wherein he exaggerated the value of said insured property at the time that said policy was issued, and that Arel in his proofs of said loss made to the defendant false and fraudulent misrepresentations as to the extent of the injury done by the fire to said property, and as to the amount of Arel's loss by reason of said fire.

There was a trial before a jury. At the close of plaintiff's evidence, the court, at the instance of the defendant, gave a peremptory instruction to find for the defendant, and a verdict was rendered accordingly. In due time the trial court, on the motion of the plaintiff, set aside said verdict and granted the plaintiff a new trial. Thereupon, in proper time, the defendant filed its motion to set aside the order granting the plaintiff a new trial, which motion was overruled, and the de-

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fendant prosecuted its appeal to the Springfield Court of Appeals, where the order of the trial court setting aside the verdict and granting a new trial to the plaintiff was held to be erroneous and the cause was remanded with instructions to the trial court to set aside its order granting the plaintiff a new trial and to reinstate the judgment previously rendered. Then followed this proceeding in which it is contended that the opinion of the Court of Appeals above mentioned is in conflict with the case of Marion v. Great Republic Ins. Co., 35 Mo. 148, and with the case of Schulter v. Merchants' Mutual Ins. Co., 62 Mo. 236, which hold that a mistake or an unintentional error or a misstatement as to an immaterial matter, or a statement of opinion as to matters concerning which opinions may reasonably differ, or a statement not made with intent to deceive, will not avoid the policy.

We deem it unnecessary to set out the evidence on which the trial court gave the peremptory instruction to find for the defendant.

We can discover no conflict whatever between the opinion of the Court of Appeals and the prior decisions of this court cited by the relator. The Marion case, *supra*, is not cited in the opinion of the Court of Appeals, but that opinion very clearly holds that to avoid the policy such false statement must be *fraudulent* (that means intentional) and must not be a mere mistake or unintentional error, or a misstatement of an immaterial fact, or a mere statement of opinion concerning matters as to which opinions may reasonably differ.

We fully recognize the rule laid down by FARIS, J., in State ex rel. Hays v. Robertson, 271 Mo. 475, l. c. 481, decided by this court In Banc, where, in speaking of the power of this court in such *certiorari* cases, it was said: "If this decision be opposed to what we said, or the conclusion which we reached upon similar facts (if the facts are similar) in the Ramlose case, we ought to quash the judgment of the Court of Appeals."

Undoubtedly, where the facts in a case before one of the Courts of Appeals are so similar to the facts in a

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case previously decided by this court as to require that the same rule of law should be applied to the facts in both cases, this court will on *certiorari* quash the judgment of the Court of Appeals when its opinion conflicts with a previous opinion of this court on that point. But this court has not in its prior opinions cited by the relator declared the law on facts similar to the facts in this case.

The relator's brief contends that the Marion and Schulter cases hold that the question as to the fraudulent intent of the insured in making any misrepresentation must be submitted to the jury. Those cases do not hold that such question must always be submitted to the jury. Where the evidence is such that the triers of fact may reach a conclusion one way or the other on that point, the case must go to the jury; but where the evidence for the plaintiff conclusively shows a fraudulent intent in making the misrepresentation a demurrer to that evidence should be sustained.

Whether the Court of Appeals was right or wrong in holding that plaintiff's evidence conclusively showed fraudulent misrepresentations by the plaintiff as to material facts, its ruling in that respect is not in conflict with any prior ruling of this court, and is, for that reason, beyond our reach.

The preliminary writ of *certiorari* herein should be quashed, and it is so ordered. *White, Co., not sitting.*

PER CURIAM: The foregoing opinion of Roy, C., is adopted as the opinion of the court. All of the judges concur.

LYNNE R. LITTLEFIELD, Appellant, v. EDWIN C. LITTLEFIELD.

Division Two, October 9, 1917.

APPELLATE JURISDICTION: Constitutional Question: Not Raised at Trial. Unless a constitutional question was both timely raised and

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decided by the trial court and preserved for review no such question can be considered or decided in the appellate court. A court of appeals is not authorized to transfer a case to the Supreme Court on the ground that to properly determine the case it would be compelled to decide a constitutional question, where no such question had been raised by either party.

Appeal from Johnson Circuit Court.—*Hon. A. H. Whitsett, Judge.*

TRANSFERRED TO KANSAS CITY COURT OF APPEALS.

Geo. W. Barnett and C. C. Kelly for appellant.

N. M. Bradley and J. W. Suddath & Son for respondent.

WALKER, P. J.—This is a suit in equity brought in the circuit court of Johnson County to annul a decree of divorce alleged to have been obtained through fraud. A trial resulted in a finding for the defendant, from which the plaintiff appealed to the Kansas City Court of Appeals.

The right of action in this case rests upon our ruling in Dorrance v. Dorrance, 242 Mo. 625, in which we held that Section 2381, Revised Statutes 1909, should be so construed as to exclude from its purview an equitable action for relief against fraudulent judgments of divorce, and hence that said section was unconstitutional in so far as it was sought to apply it to this class of cases.

The Court of Appeals on its own motion upon an examination of the record, no constitutional question having been raised by either party, certified the case to this court on the ground that in determining the same it would be compelled to decide a constitutional question and that it was therefore divested of jurisdiction.

Appellate proceedings in the Supreme Court and the Court of Appeals are regulated by well defined rules of procedure based upon constitutional and statutory provisions. The jurisdiction of these courts, so far as the consideration of appealed cases is concerned, is limited to

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a review of the proceedings of trial courts as disclosed by the records of the latter. The proper preservation, therefore, of such proceedings is a prerequisite to the right of review, in which is included jurisdiction to hear and determine. The provision of the State Constitution which gives the Supreme Court exclusive jurisdiction of appeals in cases involving a construction of the State or Federal Constitution (Sec. 5, Amdt. of 1884 to Art. 6, Constitution Mo.) while general in its terms and appearing to preclude a review by the Courts of Appeals under any circumstances of a case in which it may be made to appear that the consideration of a constitutional question is involved, is subject to certain well defined limitations, a conformity with which, under numerous rulings of this court, is necessary in determining its jurisdiction. In defining these limitations we have held that the record should show that the constitutional question was raised in the trial court. [Bennett v. Railroad, 105 Mo. 642.] Our definitive declaration in that case, which is but a type of many others, since determined, of like import, was that the question of appellate jurisdiction was not to be ascertained from anything that had been done in the appellate court, but from the record as it was when the appeal was taken; that the record is then fixed and subsequent action cannot alter it. As a *sequitur* to this reasoning the conclusion was reached that unless the record as existing at the time of the appeal showed that a constitutional question was fairly and directly raised in a trial court under a recognized method of procedure, the question was not so involved as to confer jurisdiction upon this court.

In *State ex rel. K. C. Loan Guarantee Co. v. Smith*, 176 Mo. 44, in which will be found cited numerous cases (p. 48) asserting a like doctrine, we held, in express approval of the Bennett case, *supra*, that in determining the court to which the appeal must go or in fixing the jurisdiction, it must appear from the record made in the trial court that a constitutional question was essential to the determination of the case or that the protection of the Constitution, expressly invoked, was denied by the trial

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court, that its action in that behalf was excepted to and the exception saved in an appropriate manner.

In *Shell v. Pac. Ry. Co.*, 202 Mo. 339, a constitutional question was raised by the defendant's answer and thereafter abandoned, as the record discloses no reference thereto in the progress of the trial, either in the introduction of testimony or the giving or refusing of instructions or the motion for a new trial and the trial court was not requested to rule upon a constitutional question. From an adverse judgment defendant appealed to the Kansas City Court of Appeals. In the presentation of his case there the defendant neither in his brief nor argument made any reference to there being a constitutional question in the case. The Court of Appeals, however, on its own motion certified the case to the Supreme Court on the alleged ground that a constitutional question was involved. This court, in remanding the case to the Court of Appeals, held that it was obvious that all of the constitutional questions raised in the answer had been eliminated on the trial and that they were not there for determination; that to give the Supreme Court jurisdiction of an appeal on the ground that a constitutional question was involved it must appear that the same was raised at the first opportunity in the due course of ordinary procedure. [*Lohmeyer v. Cordage Co.*, 214 Mo. 685; *Hartzler v. Met. Street Ry. Co.*, 218 Mo. 562; *Hanks v. Hanks*, 218 Mo. 670; *State v. Boehler*, 220 Mo. 4; *Miller v. Connor*, 250 Mo. 677; *King v. Estate of Stotts*, 254 Mo. 198; *Moore v. United Rys. Co.*, 256 Mo. 165; *Trust Co. v. Lyon*, 195 S. W. 1032; *State v. Swift & Co.*, 195 S. W. 996; *Hardwicke v. Wurmser*, 264 Mo. 138.]

Section 3938, Revised Statutes 1909, providing for the transfer of cases from the Supreme Court to the Court of Appeals and *vice versa*, should be construed in conformity with the rule as above announced so far as the presence of constitutional questions therein is concerned. Rulings of Courts of Appeals, therefore, are in error which hold that such courts in determining their jurisdiction in appealed cases may settle same whether the question in-

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volved has been raised by the parties thereto. *Bingaman v. Hannah*, 171 Mo. App. 186, is a case of this type.

As we have shown, if the question has not been planted in the record and continued therein on appeal it can in no way affect the jurisdiction; and however much a Court of Appeals may be impressed with its presence, such presence is only academic so far as a determination of a case is concerned.

In the instant case there is nothing to indicate that a constitutional question was raised by either party; upon an examination of the record the court came to the conclusion that it was necessary to the determination of the case to consider a constitutional question, which was erroneous because same had not been preserved in the record and was therefore not a ground of complaint.

In this view of the case the jurisdiction is properly in the Kansas City Court of Appeals and this cause is therefore ordered transferred to that tribunal for final determination. All concur.

ELIZABETH GROWNEY et al., Appellants, v. PATRICK J. O'DONNELL, JOSEPH J. O'DONNELL et al.

In Banc, November 17, 1917.

1. **APPELLATE PRACTICE:** No Bill of Exceptions: Questions for Adjudication. Absent a bill of exceptions, the only question for adjudication on appeal is whether or not the judgment is such as could have been made on the pleadings. Whether or not the deed held in judgment was procured by fraud or undue influence, or was without consideration, being questions dependent upon the facts established by the evidence and those facts being absent, cannot be considered.
2. **EQUITY: General Relief.** A court once possessed of a cause in equity will not release its hold until full equity has been done to all parties interested therein. Especially is this true where there is, in addition to the prayer for specific relief, a general prayer for relief; for, in such case, the court must consider the full import of the pleadings.
3. _____: _____: Cloud on Title: Partial Relief. Where the question for adjudication is the validity of a deed, and the specific

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prayer is that it be cancelled as a cloud upon the title to the whole tract, the court, under a prayer for general relief, can grant partial relief, and cancel it as to a part of the tract.

4. **HOMESTEAD: Deed of Husband Alone: Cancellation.** A deed made in 1909 by the husband alone, which conveyed lands of which the unassigned homestead acquired prior to the Act of 1895 was a part, is invalid as to the homestead without the signature of the wife, and as to it may be cancelled as a cloud upon the title, but is not invalid as to the rest of the tract, and as to it may be confirmed.
5. **—: Definition: Conveyance.** The homestead in the country as defined in the statute means the dwelling house and appurtenances and the land used in connection therewith to the extent and value of \$1500, and it includes only so much of the land as (together with the dwelling house and appurtenances) is worth \$1500. It is only as to that homestead that the statute makes void the individual deed of the husband.
6. **—: Conveyance by Husband Alone: Valid as to Excess.** A deed signed by the husband alone, who has a living wife, conveying a whole tract owned by him, in which he has an unassigned homestead, is not void as a whole, but is valid as to the excess of land over and above the homestead proper as defined by the statute, subject to the wife's inchoate right of dower in the excess. [Ruling that such question was not involved in *Bushnell v. Loomis*, 234 Mo. 371, and that the decision therein was not intended, in view of the facts held in judgment, to announce a contrary rule.]
7. **—: Assignment in Equitable Proceeding.** In an equitable proceeding to remove cloud upon title to land, a court of equity has power, both because of its inherent equitable powers and by the statute (Sec. 6713, R. S. 1909), to appoint commissioners to set off the homestead and the widow's dower in the whole tract conveyed by the individual deed of the husband, and by that method ascertain from what portion of the land the cloud upon the title is to be removed.

Appeal from Nodaway Circuit Court.—*Hon. J. W. Peery*, Special Judge.

AFFIRMED.

P. L. Grownay and J. H. Sayler for appellants.

(1) The land having the status of an original homestead, within the limited area, the trial court erred in finding the deed void only in part. R. S. 1909, sec. 6704; *Bushnell v. Loomis*, 234 Mo. 371. (2) The court erred in finding the deed valid as to an undetermined

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excess, and in proceeding under an inapplicable method to ascertain and set out such excess. *Crech v. Childers*, 156 Mo. 338; *Hoselton v. Hoselton*, 166 Mo. 182; *Reed Bros. v. Nicholson*, 189 Mo. 396; *Goodrich v. Brown*, 63 Iowa, 347 (cited in the notes to *McDonald v. Sanford*, 9 Am. & Eng. Ann. Cas. 1, 18 N. W. 894). (3) The answer by respondents (grantees in the deed) does not allege any equitable right in them—they paid no consideration and ask no relief in equity, and the decree is not warranted. (4) The answer of Mary A. O'Donnell, respondent, does not warrant the trial court in limiting or determining a homestead. Evidently no one is claiming a "homestead," and if the deed is void, her homestead right in the whole tract is not affected, and no pleading in the case justifies the decree as to her.

Cook & Cummins and Shinabargar, Blagg & Ellison
for respondents.

(1) The deed was a valid conveyance of the land in controversy, subject to the homestead and dower rights of the widow. *Stephens v. Stephens*, 183 S. W. 572; *Fields v. Jacobi*, 181 S. W. 65; 15 Am. & Eng. Ency. Law (2 Ed.), 683; 21 Cyc. 546. (2) The deed was valid as to the excess of land above the homestead proper. A. The statutory definition of the word homestead is found in Sec. 6704, R. S. 1909. Originally, and in popular, non-technical use now, the word "homestead" denoted the home place, the spot or place where one resides. *Elliott v. Thomas*, 161 Mo. App. 445; Webster's New International Dictionary; 2 Words and Phrases (2nd Series), 902; 4 Words and Phrases (1st Series), 3327. The homestead is the tract of limited value or area to which the law accords the special protection mentioned in the statute. *White v. Spencer*, 217 Mo. 252; 4 Words and Phrases (1st Series), 3329, citing *Keene v. Wyatt*, 160 Mo. 19; *Tyson v. Tyson*, 71 Neb. 438; *Jones v. Losekamp*, 19 Wyo. 83; *Smith v. Guckenheimer*, 42 Fla. 1; *Thorp v. Wilbur*, 71 Vt. 266; *Bebb v. Crowe*, 39 Kan. 342. The statutory prohibition against the conveyance of a homestead by the husband without joinder of the wife, has reference to the home-

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stead proper, and in no sense forbids the alienation of the surplus in the homestead land above the homestead proper by the husband alone. 15 Am. & Eng. Ency. Law (2 Ed.), 684; 21 Cyc. 551. There are a number of Missouri cases on questions closely akin to the one we are considering, which furnish ample support for the view urged. White v. Spencer, 217 Mo. 242; Childers v. Pickenpaugh, 219 Mo. 455. There is another line of cases which bears out the theory we are presenting. It is fundamental law in this State that where a homesteader conveys his homestead proper, even in an effort to defraud his creditors, the latter cannot have the conveyance set aside on account of such fraud for the reason that the homestead proper is exempt from their claims and they lose nothing by the conveyance. But if the land thus conveyed by the homesteader is in excess of the statutory limitation of size or value, can creditors have the conveyance set aside as to such excess? Most certainly they can, under repeated decisions. Buck v. Ashbrook, 59 Mo. 200; Hart v. Leete, 104 Mo. 336; Rose v. Smith, 167 Mo. 86; Rouse v. Caton, 168 Mo. 288; Balz v. Nelson, 171 Mo. 682; Stam v. Smith, 183 Mo. 469; Reed Bros. v. Nicholson, 189 Mo. 403; Welch v. Mann, 193 Mo. 314; Childers v. Pickenpaugh, 219 Mo. 455. A man can no more will away his homestead proper than he can deed it away without his wife's joining in the deed. Yet whoever heard of a devise of homestead land being void *in toto* because the disposition of the homestead proper was inoperative as to the widow? Stoepler v. Silberberg, 220 Mo. 258; Ball v. Ball, 165 Mo. 312. A conveyance of an unassigned homestead estate is valid. Weatherford v. King, 119 Mo. 51; Wilson v. Johnson, 160 Mo. 507. Where a homesteader made a deed of assignment to creditors conveying his homestead land, reserving his "homestead" the conveyance was good as to the excess, and the homestead proper could be set out any time. Hartzler v. Tootle, 85 Mo. 23. (3) The court did not err in appointing commissioners and dower. This procedure was under Secs. 6710 and 6713, R. S. 1909, authorized in an equity suit like the present

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case. It has become necessary in this proceeding to sever the homestead. Like in partition, where the homestead proper embraces all the homestead land, a severance is not necessary or possible, but when there is an excess of homestead land above the homestead proper, and a diversity of title or interest as between the owners of the surplus and the owners of the homestead proper exists, and the parties interested desire it and are before the court on proper pleadings requesting it, a severance is proper and necessary. *Stoepler v. Silberberg*, 220 Mo. 270; *Brewington v. Brewington*, 211 Mo. 64; *Quail v. Lomas*, 200 Mo. 687; *Simpson v. Scroggins*, 182 Mo. 571; *Houf v. Brown*, 171 Mo. 214; *Beckner v. McLinn*, 107 Mo. 289; *Hart v. Leete*, 104 Mo. 336; *Miller v. Schnebly*, 103 Mo. 368.

GRAVES, C. J.—Plaintiff, the daughter of Patrick O'Donnell, deceased, joined therein by her husband, brings this action in equity to set aside a deed made by Patrick O'Donnell to his sons, Patrick J. and Joseph J. O'Donnell. The petition charges:

"That said Patrick O'Donnell (deceased) was, at the date of his death, the owner in fee of the northwest quarter of the southwest quarter and the east half of the southwest quarter of section thirty, township sixty-three, of range thirty-four, in said Nodaway County, consisting of one hundred and twenty acres, and was residing thereon at the time of his death; and was also the owner in fee of 160 acres of land in Bottineau County, State of North Dakota, described as the southwest quarter of section fourteen, township one hundred and fifty-nine, north of range eighty-two, west, being all the lands owned by the said deceased at said date.

"That said Patrick O'Donnell was aged about seventy-five years and infirm, and on April 16, 1909, did become seized with pneumonia fever and ailments incident thereto, and did become seriously and alarmingly ill from the beginning of his said sickness, with every indication of approaching demise, and did so continue and linger, partly conscious and unconscious, attended by a physician, the family and neighbors, until April 24, 1909, when he died.

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"That during said sickness of deceased, to-wit, on April 21, 1909, and while said Patrick O'Donnell was sick unto death as aforesaid, delirious from high fever attendant therewith, rendering him unconscious, weak of mind and body, and evidently approaching death, the said defendants Patrick O'Donnell and Joseph J. O'Donnell fraudulently and wrongfully, and intending to cheat and defraud the other heirs at law of said Patrick O'Donnell, and especially this plaintiff, did induce, compel and cause the said Patrick O'Donnell to make purported deeds of conveyance to all of the said lands described as aforesaid to them, the said Patrick J. O'Donnell and Joseph J. O'Donnell.

"That said Patrick J. O'Donnell and Joseph J. O'Donnell, with the connivance and assistance of one Michael M. Calahan, a brother-in-law to them, and a son-in-law of deceased, did procure a lawyer from Maryville, the county seat of said county, and twelve miles distant from said O'Donnell's place of residence, and did, at the said O'Donnell home, at the hour of twelve o'clock at night, on the said date (April 21, 1909) cause to be made a deed of conveyance as aforesaid to the 120 acres of land aforesaid, situated in said Nodaway County, described as aforesaid, for the recited consideration of 'one dollar' and the further consideration as recited in said deed, 'the consideration in this deed is that the said parties of the second part shall pay to the said party of the first part one thousand dollars per year, during the term of his natural life, payable annually, on the first day of January of each and every year, which consideration is included in a deed between the same parties of even date herewith for 160 acres situated in Bottineau County, North Dakota;' which
his
deed purports to be signed 'Patrick X O'Donnell'
mark

and witnessed by 'M. M. Calahan' and 'T. A. Cummings,' and said deed was placed on record in the recorder's office of said county of Nodaway on the next morning (April 22, 1909) at nine o'clock and ten min-

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utes a. m. by the said T. A. Cummings, and appears of record in Book 165, at page 13, in said office.

"That said land so conveyed by said deed, comprised the homestead of said Patrick O'Donnell.

"That said deed was not signed by the wife, Mary A. O'Donnell.

"That said deed to said land so made at said time was not the act and deed of the said Patrick O'Donnell.

"That no consideration whatever was paid by the defendants (grantees) to the said Patrick O'Donnell.

"That there was no delivery of the said deed by the said Patrick O'Donnell to defendants, or to any one of them, or to anyone for them; but all that was done relating to said deed or deeds was the fraudulent and wrongful acts of the said defendants, assisted, advised and directed by the said M. M. Calahan, with his employed counsel, said T. A. Cummings, and all with the intent, design and purpose to cheat and defraud the other heirs at law of the said Patrick O'Donnell, and especially this plaintiff, and is a cloud on her interest and title therein."

The answer of the two sons put in issue all the charges in the petition contained. The wife and widow filed a separate answer, in which she says that she understood when the deed was made that she was left her dower interest in the land, and that she only claimed such interest. She admits that the land was the homestead. The chancellor *nisi* found against the plaintiff on the charges preferred against the defendants, in the plaintiff's petition contained, and also found against the defendants' claim that they were entitled to the land, subject only to the dower interest of their mother. The finding of the court was to the effect that the wife had not signed the deed, that she had a homestead therein, and also had a dower interest in the surplus, if the homestead interest set off to her, did not exceed one-third of the whole. In the interlocutory decree the findings are thus stated:

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"That on the 21st day of April, 1909, the said Patrick O'Donnell conveyed by warranty deed the real estate hereinbefore described to the defendants Patrick J. O'Donnell and Joseph J. O'Donnell; that at the time of said conveyance the said Patrick O'Donnell, now deceased, had mental capacity sufficient to make said conveyance, and fully understood the character and nature thereof, and that in the execution and delivery of said conveyance he, the said Patrick O'Donnell, was free from any undue influence or fraud on the part of any of the defendants by which he was induced to make said conveyance, and that the same was a legal and valid conveyance of said described land to the defendants Patrick J. O'Donnell and Joseph J. O'Donnell, except as to the homestead interest of said Patrick O'Donnell as hereinafter found and stated, and except as to the dower interest of Mary A. O'Donnell, the wife, and now the widow, of said Patrick O'Donnell, deceased, who did not join in said conveyance. The court further finds that the real estate hereinbefore described embraced and comprised the homestead of said Patrick O'Donnell, to the extent and value of fifteen hundred dollars, and that by reason of the failure of the defendant Mary A. O'Donnell, wife of said Patrick O'Donnell, to join in said conveyance, the same was invalid and void as to the homestead interest to the extent and value of fifteen hundred dollars, and was insufficient to convey said homestead interest; that the land hereinbefore described, is of greater value than fifteen hundred dollars, and that said deed and conveyance hereinbefore mentioned was legal and valid as to the excess of said land, and as to all of said land over and above the said homestead of the value of fifteen hundred dollars, subject, however, to the dower interest of the defendant Mary A. O'Donnell, if any, in such excess and part of said land over and above said homestead interest. The court further finds that the defendant Mary A. O'Donnell is entitled to have admeasured and set off, out of said land, a homestead to the extent of fifteen hundred dollars, and if such home-

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stead of the value aforesaid is less than a one-third interest in said land, then she is entitled to have set off to her one-third interest therein as dower, but the amount of such dower shall be diminished by the amount of said homestead of the value aforesaid. The court further finds that the plaintiff Elizabeth Grownay, and the defendants Patrick J. O'Donnell, Joseph J. O'Donnell, Hugh J. O'Donnell, Mary Calahan, and Margaret Bradley, being all of the children and heirs at law of said Patrick O'Donnell, deceased, are jointly entitled to the reversion and fee of said homestead of the value aforesaid, subject to the rights and interest of said Mary A. O'Donnell therein in accordance with the statute in such cases made and provided. The court further finds that it is necessary in this proceeding in equity to sever and set off said homestead from the real estate hereinbefore described in accordance with the provisions of section 6713 and 6710 of the Revised Statutes of Missouri of 1909.

"It is therefore by the court ordered and for such purpose the court hereby appoints John Clary, W. C. Pierce and W. F. Jackson, three competent persons and residents of the county of Nodaway, to be commissioners to set off to said Mary A. O'Donnell a homestead of the value of fifteen hundred dollars in the land hereinbefore described, and if in the judgment of said commissioners said homestead so set off shall not equal one-third of the whole value of said land, then in addition to such homestead, they shall set off said Mary A. O'Donnell, as dower such further portion of said land as shall, when added to the value of said homestead, make the whole amount of land so set off to said Mary A. O'Donnell equal to one-third of the entire value of said real estate hereinbefore described; and in fixing the value of said homestead, and the value of said dower, if any, said commissioners are directed and instructed to value and appraise said real estate at its value at the date of the death of the said Patrick O'Donnell, to-wit, April 24, 1909; and said commissioners, before setting off said homestead, shall

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first give to said Mary A. O'Donnell the right and privilege to select or indicate from what part or portion of said tract of land she desires said homestead to be admeasured and set off. And said commissioners shall make report of their proceedings herein at the next term of this court, until which said next term of this court this cause is continued for final judgment, order and decree herein, in accordance with the findings hereinbefore stated and set out."

Commissioners were duly appointed, and they having reported, the court entered the following final judgment in the case:

"Now on this 5th day of November, 1913, the same being the . . . day of the September term, 1913, of the Circuit Court of Nodaway County, Missouri, this cause coming on for final hearing, the plaintiffs appear by their attorneys and the defendants appear by their attorneys, and all parties announce ready for trial, the court doth proceed to take up, hear and consider the report of William F. Phares, John Clary and W. T. Jackson, commissioners heretofore appointed by this court, to set off dower and homestead to the defendant Mary A. O'Donnell in the following described land, to-wit:

"The northwest quarter of the southwest quarter and the east half of the southwest quarter of section thirty, township sixty-three, range thirty-four, Nodaway County, Missouri, consisting of one hundred and twenty acres.

"And after considering said report, and it appearing that no exceptions to the assignment of homestead and dower as made therein have been filed by the parties, said report is in all respects confirmed and approved, and it is hereby ordered, adjudged and decreed that the title to the following described land be vested in said widow, Mary A. O'Donnell, as her homestead, to-wit:

"The south twenty acres of the northwest fourth of the southwest quarter of section thirty, township sixty-three, range thirty-four, Nodaway County, Missouri.

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"It is further ordered, adjudged and decreed that the defendant widow, Mary A. O'Donnell, have and retain as and for her dower in the estate of Patrick O'Donnell, deceased, the following described land, which is hereby set off and assigned to her as dower in excess of her aforesaid homestead, to-wit:

"The south seven acres of the north twenty acres of the northwest fourth of the southwest quarter of section thirty, township sixty-three, range thirty-four, being a strip of land fourteen rods wide north and south by eighty rods long east and west, immediately adjoining said homestead on the north.

"It is further ordered, adjudged and decreed that the plaintiff Elizabeth Grownay, and the defendants Hugh J. O'Donnell, Mary Calahan and Margaret Brady, take no right, title, or interest in any part of the land herein described, save and except an undivided one-sixth each in and to the homestead of said Mary A. O'Donnell, above described, subject, however, to her homestead rights in the homestead hereinbefore described, until her remarriage or death.

"It is further ordered, adjudged and decreed that the defendants Patrick J. O'Donnell and Joseph O'Donnell have and take the sole and exclusive right, title, and interest in and to all of said one hundred and twenty acres of land herein first described, excepting the twenty acres above set out as a homestead to said widow and the seven acres above set out to said widow as and for her dower, and that upon the remarriage or death of said widow, the said Patrick J. O'Donnell and Joseph J. O'Donnell have and take an undivided one-sixth interest each in and to said twenty acres homestead, above described, and an undivided one-half interest each in and to said seven acres, hereinbefore set aside as dower for said widow, upon the death of said widow.

"It is further ordered, adjudged and decreed that the plaintiff Lawrence F. Grownay and the defendants Clara O'Donnell, Michael M. Calahan and William F. Brady have and take no right, title or interest whatever

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in and to any of the above described land, save and except such subsidiary rights as they may respectively have in the interest of their several spouses in virtue of dower or courtesy and their other marital rights, under the laws of this State.

"It is further ordered, adjudged and decreed that the warranty deed from Patrick O'Donnell, deceased, to the defendants Patrick J. O'Donnell and Joseph J. O'Donnell, dated April 21, 1909, be and the same hereby is held and adjudged valid and binding to vest title in and to all the land herein described in the defendants Patrick J. O'Donnell and Joseph J. O'Donnell, save as to said homestead and dower hereinbefore described, and that they recover their costs herein expended."

We have set out these matters fully, because there was no bill of exceptions filed, and the case is here upon the record proper.

I. Absent a bill of exceptions the validity of the deed from Patrick O'Donnell to his sons cannot be here attacked from the standpoint of the facts held in judgment by the chancellor *nisi*. We proceed upon the ~~Belief~~ theory that the grantor was mentally capable of ~~in~~ ^{Belief} Equity making a deed; that he was not coerced, forced or over-persuaded in the making of the deed; that such deed was not fraudulently procured; that it was executed for a valuable consideration; and that it was duly delivered. We do this, because these were all questions of facts, and these facts are not before us. In the absence of the facts the right action of the trial chancellor is presumed.

Indeed, absent a bill of exceptions, the only question is whether or not the judgment is such as could have been entered upon the issues made by the pleadings.

This is an action in equity, with prayer for general relief. The answer of the two sons is in the alternative. We did not state this fully in our statement, but do so now. These two defendants (grantees in the deed)

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claimed in their answer (1) that they were possessed of a full title to all the land, subject only to the dower interest of the widow, but (2) in the alternative they asked that, if the chancellor could not so find, and did find that the deed did not convey the homestead, then that the court have the homestead admeasured, and declare the interest of the parties therein. The chancellor compelled the plaintiffs to bring in all parties who might have an interest in the lands, upon any theory of the case.

It is a rule in equity that if the court becomes possessed of a cause in equity, it will not release its hold until full equity has been done all parties interested therein. Thus in *Harrison v. Craven*, 188 Mo. l. c. 602, it is said:

"There was no error *nisi* in finding for respondent on the first count, in so far as the damages claimed were concerned. The trouble does not lie with the right of a court of equity to deal with the subject of damages, were the damages of an allowable character; for a court of equity to deal with the subject-matter of a suit within its grasp, will go on and retain its grasp on the *res* in order to avoid circuity of action and do rounded-out and complete justice by awarding damages as well as relief in kind. [Baile v. Ins. Co., 73 Mo. l. c. 384; Woodard v. Mastin, 106 Mo. l. c. 362; Morrison v. Herrington, 120 Mo. l. c. 668.]"

Especially is this true where there is a prayer for general relief, as here. In our statement we did not set out plaintiffs' prayer for relief, but there is, in addition to specific prayer for relief, a general prayer for relief. So that, in this case, we must not only consider the rule in equity first above stated, but also the full import of the pleadings.

II. In this case the plaintiffs sought the cancellation of the deed, because such deed cast a cloud upon

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their title. The court by its judgment refused to cancel the deed as to all of the land, but did nullify the effect of the deed as the plaintiff's interest in 20 acres of the land. The question before the court was the validity of this deed and the effect of such deed under the facts pleaded. Unless precluded by a matter which we discuss next, we do not see that the judgment or decree entered was not one within the purview of the case before the court.

Cloud on Title: **Partial Belief.** The prayer for specific relief asked for the removal of the cloud of title (created by the deed) from the whole tract of 120 acres, but under the prayer for general relief a court of equity could grant partial relief, to say the least, and yet the decree would be within the purview of the pleadings. [16 Cyc. 487.]

III. Equity respects and follows the law, and one of the contentions in this case is, that under the law, the deed was absolutely void as to the whole tract, because such tract of land was the homestead of the grantor, and the wife did not join in the deed. Taking the interlocutory and final judgment together (and this we must do) the point comes up properly on the face of the record proper. The judgment or decree shows that the chancellor held the deed invalid as to the homestead proper, but valid as to the excess. Does this action of the court do violence to our statutes and the law? This is the principal question. This tract of 120 acres was acquired and made a homestead prior to the Act of 1895, but this becomes immaterial under our ruling In Banc in Bushnell v. Loomis, 234 Mo. 371, which overruled Gladney v. Sydnor, 172 Mo. 318. In the Gladney case it was held that when the homestead was acquired prior to 1895, the homestead lands could be conveyed by the husband, without the wife joining, although he made his deed after the Act of 1895. This rule was changed by the Bushnell case, supra, and we there held that there could be no valid deed made to the homestead proper, without the wife joining, whether the homestead came into

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Deed to
Land in
Excess of
Homestead.**

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being before or after the Act of 1895. The chancellor trying this case followed the Bushnell case, and held that although the homestead had become fixed prior to Act of 1895, yet it required the signature of the wife to make such deed valid as to the homestead proper. He further held that the deed was good as a conveyance of all the tract of land in excess of the legal homestead, and of all interests in such excess, except the inchoate dower of the wife. Was the learned chancellor right in this holding? We think so.

The word "homestead" has been loosely used in the opinions. At times it has been made to apply to the tract of land out of which the legal homestead or homestead proper, would have to be carved. But we must determine what is meant by the term "homestead" as used in section 6704, Revised Statutes 1909. That section reads:

"The homestead of every housekeeper or head of a family, consisting of a dwelling house and appurtenances, and the land used in connection therewith, not exceeding the amount and value herein limited, which is or shall be used by such housekeeper or head of a family as such homestead, shall, together with the rents, issues and products thereof, be exempt from attachment and execution, except as herein provided; such homestead in the country shall not include more than one hundred and sixty acres of land, or exceed the total value of fifteen hundred dollars; and in cities having a population of forty thousand or more, such homestead shall not include more than eighteen square rods of ground, or exceed the total value of three thousand dollars; and in cities having a population of ten thousand and less than forty thousand, such homestead shall not include more than thirty square rods of ground, or exceed the total value of fifteen hundred dollars; and in cities and incorporated towns and villages having a population less than ten thousand, such homestead shall not include more than five acres of ground, or exceed the total value of fifteen hundred dollars. The husband

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shall be debarred from and incapable of selling, mortgaging or alienating the homestead in any manner whatever, and every such sale, mortgage or alienation is hereby declared null and void."

To what does this statute refer when it says "and every such sale, mortgage or alienation is hereby declared null and void." That it refers to the "homestead" as mentioned in the previous part of the section there can be no question. The question is what is that homestead? The case here is a "homestead" in the country, and we shall confine our remarks to such a "homestead" and it in the language of the statute is made up of "a dwelling house and appurtenances, and the land used in connection therewith, not exceeding the amount and value herein limited." The limitations mentioned above are: "such homestead in the country shall not include more than 160 acres of land, or exceed the total value of fifteen hundred dollars." So that the statute defines the meaning of a homestead proper. By the term "homestead" as used in the statute, is meant the dwelling house and appurtenances and the land used in connection therewith to the extent and value (house, appurtenances and land taken together) of \$1500, but in no event shall the amount of land exceed 160 acres, although the combined value may be less than \$1500. This homestead tract may be greatly less than 160 acres, owing to the value of the house, appurtenances and land. And it is this \$1500 worth of land and improvements thereon that is the homestead which is referred to when the later clause of the statute makes the individual deed of the husband thereto void. The statute does not have reference to the whole tract out of which the homestead is to be carved.

By appellants we are cited to the Bushnell case, supra, as authority for the contention that the deed is void as to the whole tract out of which (under given circumstances) the homestead would be carved. The writer wrote the opinion in that case, and we had no such idea. We did use the expression: "In such case she

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has not joined in the conveyance and the conveyance is wholly void." The facts of that case must be considered. The land involved was only forty acres and no claim was made that it exceeded in value the \$1500. The wife signed a deed of trust thereon when mentally incapacitated to execute such instrument. The forty-acre tract was used as a homestead. The question of there being an excess of land over the homestead proper was not in the case. So this language was never used in a way to mean that the deed of the husband to the whole tract out of which the homestead would be carved, was wholly void, both as to the homestead proper, and the land in excess of the homestead. We had previously strongly intimated to the contrary, in White v. Spencer, 217 Mo. 242. In the White case it was urged that a judgment lien would not attach to any portion of the tract out of which a homestead might be carved. We held that the lien would attach to all of the land in excess of the homestead, and as these views contravened some broad language used in Macke v. Byrd, 131 Mo. 682, the White case was sent to Court in Banc, and there unanimously approved. We also held in that case (217 Mo. l. c. 258) :

"The word homestead as here used means a tract of land falling within the statutory limitations as to quantity and we might add, value, although not herein involved. We have properly construed the homestead act to mean that no lien attaches to a homestead proper, that is, to the tract owned, occupied and claimed as a homestead, when it falls within the statutory limitations as to quantity and value."

It thus appears that the Court in Banc holds that the excess in the homestead tract over and above the "homestead proper" as defined by statutes is subject to a judgment lien. The exact question involved in the case at bar, i. e., is a deed, signed by the husband alone, covering the whole homestead tract, valid as to the excess over and above the "homestead proper," as defined by statute, has never been decided in this State. The general current of authority holds such deed valid

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as to the excess, subject, of course, to the inchoate right of dower. In 21 Cyc. 551, it is said:

"The view is sustained by the majority of the courts that a deed covering the homestead and other lands, or covering a single tract whose value exceeds the statutory exemption, although it be invalid as to the homestead, may yet be sufficient to convey or encumber that portion of the property which is in excess of the statutory exemption."

So too in 15 Am. & Eng. Ency. of Law (2 Ed.), p. 684, it is said:

"The various provisions of the statutes to the effect that a conveyance or alienation of the homestead without the joinder or consent of the husband shall be void or ineffectual have been held not to render it ineffective so far as concerns property covered thereby which is not included within the homestead, the conveyance being regarded as valid so far as concerns any excess, either in quantity or value, over the statutory exemption. This is either expressly or impliedly stated in a number of cases. In other cases it is broadly stated that the conveyance is absolutely void without any reference to the question whether it would be valid as to any excess over the statutory exemption; but these are generally cases in which there was no such excess, and consequently a consideration of the question of the effect of the conveyance upon the excess was not called for. Apparently the only case in which a different view from that above stated has been taken was decided in Massachusetts, the conveyance being there held to be void as to all the land covered thereby, though greatly exceeding the value of the exemption. Since then the prevailing rule has been adopted in that State by statute."

It is evident the word "husband" in the above has been inadvertently used for "wife." This rule seems to us reasonable, and under our statute the only one which could be applied. The purpose of the Homestead Act was to allow the husband, as exempt, \$1500 worth of real estate, and in the event of his death this real estate, so exempted, passed to the widow and children.

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If the husband had \$1500 of real estate upon which he lived, and then 80 acres of the value of \$5000, which was not used in connection with the homestead proper, there can be no question that a deed to both tracts signed by him alone, would carry his title to the 80 acres, subject to the inchoate dower right of his wife. We think in reason that the same rule should apply as to the excess in the homestead tract. Suppose a man had a section of land upon which he lived and all of it was used as one farm and in connection with the house and appurtenances there, would it be said that the husband's deed to this 640 acres of land would convey no title or interest to his vendee? Or suppose he only had eighty acres, but the house and south forty thereof was worth more than \$1500, would his deed to the whole eighty give the purchaser no title to the north forty? We are satisfied that the husband's deed to the tract of land out of which a homestead proper is to be carved, will convey all excess to the purchaser, save and except the inchoate right of dower. Such were the views of the chancellor *nisi* in this case, and we approve them.

IV. It is thus contended in appellant's brief:

"The court erred in finding the deed valid as to an undetermined excess, *and in proceeding under an inapplicable method to ascertain and set out such excess.*"

The italics are ours. The first of these two contentions we have just disposed of in the foregoing paragraph. We have left only the italicized portion of the contention. As stated, the chancellor *nisi* had all interested parties brought before him. He then heard all issues and concluded that a homestead should be ad-measured before final decree, and he appointed three commissioners to set out the homestead. The question is, was this proper in this equitable proceeding to remove cloud from title? We thinks so, as said, when courts of equity once become possessed of the *res* such courts can and should fully determine the matter as to all parties and as to all interests. The court trying this case, in determining whether or not plaintiffs were entitled

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to have a cloud upon their title removed, had the right to determine what title if any the plaintiffs had. Not only so, but in what portion of the land, if any, they had a title to be clouded by the deed sought to be canceled. We think the inherent powers of equity would authorize the course here pursued. In other words, the court had the right to determine, as it thought best, the interest, if any, of the plaintiffs in and to this land, the title to which might be clouded by the dispute. So on the broad power of equity, we might rest the case.

But we have a statute, which in our judgment fully covers the procedure followed by the learned chancellor. Section 6713, Revised Statutes 1909, reads:

“Whenever, *in any case not in this chapter otherwise provided for*, it shall become necessary, in any proceeding at law or *in equity*, to sever or set out any homestead from other real estate, the court in which such proceedings shall be pending may appoint three commissioners to appraise and set out such homestead, which commissioners, after being sworn to the faithful discharge of their duties, shall appraise and set out such homestead in the same manner as is provided in this chapter for setting out homesteads in case of the levy of execution, and make report of their doings to such court, which report shall be confirmed by such court, unless good cause be shown to the contrary; and a record thereof shall be made in the records of lands, where a deed of such homestead would by law be required to be recorded, which shall operate as a severance of such homestead from such other real estate.”

Upon its face the statute contemplates the admeasurement of a homestead in cases not specifically named, and in addition contemplates that courts of equity may resort to the procedure in the chapter named. In fact, it authorizes the appointment of commissioners in suits in equity. So far as the record proper discloses the case was well tried below, and the judgment is affirmed.

PER CURIAM: The foregoing opinion of GRAVES, J., in Division is adopted by the Court in Banc as the opinion of the Court in Banc. All concur, except *Bond*, J., who dissents.

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**THE STATE ex rel. JOHN B. MORGAN, Appellant, v.
IDA E. HEMENWAY.**

In Banc, November 17, 1917.

1. **TAXATION: Agricultural Lands by City: Exemption: Repeal by Legislature.** In the absence of a constitutional inhibition to the contrary (and there was none in the Constitution of 1820), the Legislature was vested with inherent power to repeal a provision in a charter granted by special act of the Legislature in 1853 forbidding the city to levy and collect taxes on lands included within an extension of its corporate boundaries unless and until said lands were laid off into lots. Said act did not create a contractual obligation on the part of the General Assembly to exempt said lands from city taxes, nor an express or implied agreement to refrain from repealing said exemption or amending said act.
2. **_____: _____: Subject to Subsequent Laws.** Lands exempt from city taxation by a special charter granted in 1853 became subject to taxation for city purposes after said city became a city of the fourth class, under the general law of taxation relating to cities of such class, there being nothing in the then Constitution or in the act itself which inhibited the General Assembly from making such property subject to city taxes.
3. **_____: _____: No Exemption by Subsequent Act.** Section 11335, Revised Statutes 1909, does not exempt agricultural or pastoral lands included within the corporate limits of a city which was incorporated by special act of the Legislature in 1845, amended in 1853 so as to include such lands and providing that they were not to be taxed until laid off into lots; and the General Assembly had power, under the Constitution of 1875, to enact said Section 11335, omitting such exemption therefrom.
4. **_____: _____: Prospective Operation of Constitution of 1875.** The Constitution of 1875 was not intended to be so prospective in its operation as to forbid the Legislature from repealing a provision in the special charter granted to a city in 1853 exempting agricultural lands within its then corporate limits from city taxes. The Constitution in effect declared that the owner of such lands should not after its adoption receive the benefit of any exemption from taxation found in said special charter.
5. **_____: _____: No Longer Considered Within Corporate Limits.** The fact that agricultural land was brought within the city limits by legislative enactment in 1853, and that the exemption of it from city taxation was one of the inducements for bringing it in,

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and that subsequently the Constitution and statutes repealed that exemption, valid when made in 1853, do not constitute a sufficient reason for considering the property as no longer within the city's corporate limits.

Appeal from Howard Circuit Court.—*Hon. A. H. Waller, Judge.*

REVERSED AND REMANDED (*with directions*).

Calfee & Westhues for appellant.

(1) Section 3 of the amendment to the charter in question exempting said land from taxation was made null and void by the Constitution of 1875, being in direct conflict with sections 6 and 7 of article 10 of said Constitution. *Birch v. Plattsburg*, 180 Mo. 413; *Westport v. Magee*, 128 Mo. 152; *State ex rel. v. O'Brinen*, 89 Mo. 631; *Hislop v. Joplin*, 250 Mo. 588; *Hayward v. People*, 145 Ill. 55; *McQuillin on Municipal Corporations*, secs. 291, 295. (2) All laws in conflict with the Constitution of 1875, were repealed on its adoption. Section 1 of the Schedule declared "that the provisions of all laws which are in conflict with this Constitution shall cease upon its adoption." *Deal v. Mississippi County*, 107 Mo. 468; *St. Joseph Board v. Poetten*, 62 Mo. 444. (3) Though section 3 of the amendment to the charter exempting defendant's land from taxation for city purposes was repealed and made null and void by the constitutional provisions above cited, the other sections of the act extending and defining the city limits are valid and are in force, being separative from the exemption section, and a valid law. *Birch v. Plattsburg*, 180 Mo. 413; *Hislop v. City of Joplin*, 250 Mo. 588; *Westport v. Magee*, 128 Mo. 152; *Hayward v. People*, 145 Ill. 55; *L. & N. Ry. Co. v. Barboursville*, 105 Ky. 174; *McQuillin on Municipal Corporations*, 295. (4) The Legislature in extending the limits of Glasgow and exempting certain property both real and personal, in said limits from city taxes, recognized that the exemptions in said act were mere privileges and could be repealed at any time, with-

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out disturbing the extension section. The Legislature itself repealed the exemption as to personal property, by an act amending the city charter in the year 1873 (see Laws 1872-3, 236, sec. 3), thereby placing their own construction on said act to the effect that it could be amended at any time. The intention of the Legislature was that the exemption could be repealed at any time without disturbing the extension section. *Hislop v. Joplin*, 250 Mo. 588. (5) It is the duty of the courts to enforce the organic law and to brush aside statutes which conflict with it whether passed before or after the Constitution was adopted. *Deal v. Mississippi County*, 107 Mo. 468; *Railroad v. Thornton*, 152 Mo. 570. (6) The exemption clause in section 3 of the amendment to the charter, exempting defendant's land from city taxes, constituted a mere privilege and defendant has no right in the same, and such exemptions may be repealed at any time, by the adoption of a constitutional provision in conflict therewith. *Deal v. Mississippi County*, 107 Mo. 468; 5 *McQuillin on Municipal Corporations*, sec. 2401; *Hayward v. People*, 145 Ill. 55; *Galloway v. Memphis*, 116 Tenn. 738; *Powell v. Parkersburg*, 28 W. Va. 698; *Probosco v. Moundsville*, 11 W. Va. 501; *East Saginaw Mfg. Co. v. East Saginaw*, 19 Mich. 259; *L. & N. Ry. Co. v. Barboursville*, 105 Ky. 174. (7) Such exemptions may be repealed by implication. *Powell v. Parkersburg*, 28 W. Va. 698. (8) Exemptions granted by the Legislature before the Constitution of 1875, and in conflict therewith, have been held to be valid, but only when they constituted contracts in a charter granted to some corporation or school, etc., and never in a case like the one before the court now. *Deal v. Mississippi County*, 107 Mo. 468; *Scotland County v. Railroad*, 65 Mo. 123; *Washington University v. Rause*, 3 Wall. (U. S.) 439; *Railroad v. Laclede Co.*, 57 Mo. 147. (9) When the city of Glasgow changed from a city of the special charter to a city of the fourth class, it abandoned the old charter, and the exemption section of the Act of 1853 is in direct conflict with the charter of the cities of the fourth class; therefore, the exemption in the old

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charter is no longer in force and the city has all powers prescribed in the charter for cities of the fourth class. Among the powers is the power to tax all lands within its limits. 28 Cyc. 244; Westport v. Magee, 128 Mo. 152; State ex rel. v. Young, 259 Mo. 56; Jefferson v. Edwards, 37 Mo. App. 617; Hayward v. People, 145 Ill. 55; Powell v. Parkersburg, 28 W. Va. 698; Galloway v. Memphis, 116 Tenn. 736; Secs. 9347, 9351 and 9400, R. S. 1909. Section 9400 gives the authority to levy taxes on all real estate within the city limits. (10) Every citizen of a city under a special charter enjoys his citizenship subject to such provisions whereby such city may elect to enter the general class and be subject to all the tax laws. State ex rel. v. Young, 259 Mo. 56. (11) The adoption of a new charter repeals the original charter, although there are no express words of repeal. 28 Cyc. 244; Jefferson v. Edwards, 37 Mo. App. 617; Hayward v. People, 145 Ill. 55.

James A. Collet and James H. Denny for respondent.

(1) Section 3 of the Act of 1853, exempting the land of defendant from taxation, was constitutional and valid under the Constitution of 1820 in force when this act was passed. Kansas City v. Cook, 69 Mo. 127; Lee v. Thomas, 49 Mo. 112; State ex rel. v. Board of Trustees, 175 Mo. 60; St. Vincent's College v. Schaeffer, 104 Mo. 261; State ex rel. v. Cemetery Association, 11 Mo. App. 570; Scotland County v. Railroad, 65 Mo. 123. (2) The provisions of the Constitutions of 1865 and 1875, in the matter of exempting property from taxation, were intended to be prospective only in their operation, and did not affect previous exemptions. State ex rel. v. Board of Trustees, 175 Mo. 60; State ex rel. v. St. Joseph's Convent, 116 Mo. 580; State ex rel. v. William Jewell College, 234 Mo. 319; State ex rel. v. Cemetery Assn., 11 Mo. App. 570. (3) The cases cited by appellant are all cases of legislative exemptions since the Constitution of 1875, admitted to be unconstitutional, and the only question involved was whether the valid could be separated from the invalid portion of the act in relation to extension of city

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limits. They are entirely different from this case where the exemption was constitutional and valid under the Constitution in force when it was passed. (4) But even since the Constitution of 1875 where the exemption clause was an inseparable condition and part of the act, the whole act was held void. *Copeland v. St. Joseph*, 126 Mo. 429; *State ex rel. v. Wardell*, 153 Mo. 319. (5) Exemption from taxation was the inseparable condition on which defendant's land was annexed to the city, and if either Constitution of 1875 or the act of the city in becoming one of the fourth class did repeal or annul the condition, as claimed by appellant, then the whole act perished with it, and the land is not in the city, and in either event not liable to city taxation. *Kansas City v. Cook*, 69 Mo. 127; *Copeland v. St. Joseph*, 126 Mo. 429; *State ex rel. v. Wardell*, 153 Mo. 319. (6) As section 7 of article 10 of the Constitution operated prospectively only, the previous Act of 1853 remained in force until repealed by the Legislature. Section 1 of Schedule, Constitution 1875. (7) A special statute is not repealed by a general statute unless it expressly refers to same. *Folk v. St. Louis*, 250 Mo. 116; *State ex rel. v. Macon County*, 41 Mo. 453; *State ex rel. v. Greer*, 78 Mo. 188; *State ex rel. v. Cemetery Assn.*, 11 Mo. App. 570. (8) The same rules of construction apply to constitutions as to statutes in matters of repeals. *State ex rel. v. Greer*, 78 Mo. 188; *State ex rel. v. Macon County*, 41 Mo. 459. This property cannot be lawfully taxed by the city until the Legislature repeals the exemption in the Act of 1853, and confers the taxing power on the city. (9) The Constitution, of its own force, confers no power to levy taxes. The provisions of the Constitution other than the restrictions on rates, require legislative aid. *State ex rel. v. Van Every*, 75 Mo. 530; *Arnold v. Hawkins*, 95 Mo. 572; *Public School Board v. Patton*, 62 Mo. 449. (10) "The taxing power may be exercised by the General Assembly for State purposes, and by counties and other municipal corporations, under authority granted them by the General Assembly, for county and other corporate purposes." Sec. 1. Art. 10, Constitution Mo. 1875. (11) "The General As-

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sembly shall not impose taxes upon counties, cities, towns, or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." Sec. 10, Art. 10, Constitution 1875. (12) The power to tax comes from the Legislature, and until it acts giving the authority to levy taxes, there is no power to levy any taxes of any kind whatever. *St. Louis v. Wenneker*, 145 Mo. 238; *Kansas City v. Building & Loan Assn.*, 145 Mo. 50; *Valle v. Ziegler*, 84 Mo. 214; *State v. Railroad*, 77 Mo. 202. (13) The Legislature must provide for the taxation of property. The ways and means for the assessment of property must be provided by law. Omissions in that behalf cannot be supplied by the courts. *St. Louis v. Wenneker*, 145 Mo. 238. (14) Unless the Legislature exercises its legitimate functions and subjects certain property to taxation it is evident that the constitutional proviso, section 7, article 10, Constitution of 1875, cannot, because of such lack of legislation, become self-enforceive. *Kansas City v. Building & Loan Assn.*, 145 Mo. 53. (15) The courts of this State have recognized the distinction between property expressly exempted from taxation and property not taxed because the Legislature has not conferred the taxing power. *Kansas City v. Cook*, 69 Mo. 127; *Kansas City v. Bldg. & Loan Assn.*, 145 Mo. 50; *State ex rel. v. Wenneker*, 145 Mo. l. c. 230. (16) The Legislature has never conferred the power on the City of Glasgow to tax the land annexed by the Act of 1853; on the contrary, it has withheld the power until such time as this land is laid off into lots, or until this act is altered, amended or repealed by the Legislature. (17) Cities having special charters were not deprived of them by the adoption of the Constitution merely, without supplementary legislation to that effect. *State ex rel. v. Fraser*, 98 Mo. 429; *Rutherford v. Hamilton*, 97 Mo. 547. (18) This exemption right under the Act of 1853 has been expressly preserved by the Legislature in cases where cities reorganize under general law until such time as the

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General Assembly may see fit to abolish it. Secs. 8530, 9300, R. S. 1909. (19) If the respondent's property was being brought into the city and subjected to taxation under present laws, she would have the right to have the court to pass upon the reasonableness of the extension. The city could not arbitrarily, even by vote of the people, extend its limits merely to increase its revenue, without any corresponding advantages to the property owner. Kelly v. Meeks, 87 Mo. 396; Copeland v. St. Joseph, 126 Mo. 417; Hislop v. Joplin, 250 Mo. 588; State ex inf. v. Kansas City, 223 Mo. 162.

RAILEY, C.—On January 14, 1916, this action was commenced in the circuit court of Howard County, Missouri, by the State, on behalf of John B. Morgan, as collector of the revenue of Glasgow, a city of the fourth class, against defendant, Ida E. Hemenway, for delinquent taxes of the year 1915, assessed against thirty-eight acres of land, situated in section 9, township 51, range 17, located in said city, and belonging to her. It is conceded that the petition is in the usual form.

The answer admits: The incorporation of Glasgow as a city of the fourth class; that said Morgan is the legally qualified and acting collector of said city; that defendant, at the time of the institution of this suit, and at all the dates mentioned in the petition, was the owner of the real estate described in said petition; that said city has taken all proper steps in the collection of taxes against defendant's property to entitle it to recover in this suit, provided the property is subject to levy and collection of city taxes. The answer then pleads as a defense:

"First: That the city of Glasgow was originally organized and incorporated under a special charter, by an Act of the Legislature, approved February 27, 1845, entitled 'An Act to Incorporate the City of Glasgow,' and by an act amendatory thereof, approved January 31, 1853, entitled 'An Act to Amend an Act to Incorporate the City of Glasgow,' approved February 27, 1845.

"Second: That said city by virtue of said acts became and remained a city under a special charter, until

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the 23rd day of March, 1915, when it elected to become a city of the fourth class, under the laws of the State of Missouri.

“Third: That the original act incorporating said city under special charter did not include defendant’s said real estate, but that said real estate, together with much other real estate of the same character, was first included in the city limits by the Act of the Legislature of 1853, amending said original act.

“Fourth: That by provisions of the amendatory act of 1853, and by which alone defendant’s land became a part of the city of Glasgow, it was expressly provided that the mayor and councilmen of said city should not have the power to collect taxes on any real estate annexed to the city by said act, unless the same was then, or should thereafter be, laid off into lots.

“Fifth: That defendant’s said real estate was not at that time, and never has been laid off into lots.

“Sixth: That defendant’s said land was at the time of the passing of said amendatory act, and is now, and has at all times been adapted, fitted and used only as farm and pastoral lands; that it is of uniform width of 582 feet, fronting south on the public road, and extending back to Bear Creek, the northern boundary of the city, and containing about thirty-eight acres.

“Seventh: That no other road, street or thoroughfare of any kind, save the public road extending along the south boundary of said land, traverses or touches it.

“Eight: That said land contains only a single habitation, the abode of defendant.

“Ninth: That the lands adjacent to defendant’s said land are used only as farm and pastoral lands, and have not been subdivided into lots or blocks.

“Tenth: That there has been no increase in the population of the city of Glasgow, since the adoption of said amendatory act of 1853, creating a demand for defendant’s land, or lands adjacent thereto, for residence or other city purposes, or adding to said lands any value distinct from its natural use for farm and pastoral lands.

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“Eleventh: That by said amendatory act of 1853 the Legislature recognized that it would be unfair and unjust to allow lands of the character of defendant’s land, used only for farm and pastoral lands, to be taxed for city purposes, and by said act withheld from the city of Glasgow the power to tax said lands until such time as it should be laid off into lots, and that said lands were brought into the city of Glasgow upon the express terms and conditions that the same were to be exempt from city taxes, until such time as they should be laid off into lots.

“Twelfth: That the terms and conditions of said act of 1853, and all of them, were and are now a binding obligation and contract on the part of the city of Glasgow, and the owners of the lands therein, and that said terms and conditions were not and could not be annulled or abrogated by the city of Glasgow on becoming a city of the fourth class, or otherwise, but still remain a binding limitation upon its power, and that an attempt of the city to tax this property is an unlawful, unreasonable and arbitrary exercise of power.

“Thirteenth: That the city of Glasgow in assuming to tax defendant’s lands, contrary to the terms of the act of the Legislature which brought the land into the city limits, is an attempt to impair the obligation of the contract contained in said act, and to deprive defendant of her property without due process of law, in violation of section 10, article 1, of the Constitution of the United States, and sections 15 and 30 of article 2, of the Constitution of the State of Missouri, and take private property for public use without due compensation contrary to section 21, article 2, of the Constitution of Missouri.”

A general demurrer was interposed by plaintiff to said answer, on the ground that it failed to controvert the allegations of said petition and because it did not contain facts sufficient to constitute a valid defense in this case. On September 28, 1916, the above demurrer was by the court overruled; plaintiff declined to plead further and a general judgment was rendered in favor of defendant. Plaintiff, in due form, appealed from said judgment to this court.

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I. The only question involved in this appeal, is whether or not respondent's land is subject to taxation by the city of Glasgow. A determination of this issue involves the consideration of disputed questions of law.

~~Repeal of Tax.~~ The city of Glasgow, in Howard County, Missouri, was incorporated under a special act of the Missouri Legislature, approved February 27, 1845, and its original charter provisions will be found in the Acts of 1844-5, at pages 141 and following. It is conceded that the land in controversy was not included within the boundaries of Glasgow, by the terms of the special charter of 1845, supra. The Legislature by a special act approved January 31, 1853, reported in the Acts of 1852-3, at pages 251-2, amended the act of 1845, so as to include within the boundaries of Glasgow, the land in controversy. Section one of the amendatory act describes the boundaries of said city and need not be set out here. Sections 2, 3 and 4 of same read as follows:

"Sec. 2. The mayor and councilmen of the city of Glasgow are hereby authorized and empowered to do all acts and things, and to have the same jurisdiction within the limits hereby established, that were conferred by the act of incorporation to which this is amendatory, except as hereinafter provided.

"Sec. 3. The mayor and councilmen shall not have the power to levy and collect taxes on any real estate unless the same is laid off into lots, or may hereafter [be] laid off into lots; and no taxes shall be levied or collected on any personal property situated upon any real estate not laid off into lots within the above limits.

"Sec. 4. Not less than one-half of the amount of taxes levied and collected from the new limits incorporated within said city, shall be expended in improvement of the new limits.

"This act shall be in force from and after its passage."

It is conceded by counsel upon both sides—and properly so—that when the Act of 1845, as well as that of 1853, supra, were passed, there was no provision in our

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Constitution, as it then stood, which forbade the Legislature from passing said acts, or either of them, nor from exempting defendant's land aforesaid from taxation, as provided in the Act of 1853. On the other hand, without the consent of defendant, the Legislature, in 1853, if it had seen fit to do so, could have included defendant's property within the boundaries of Glasgow, and have subjected the same to the payment of city taxes like those sued for in this suit. There was no *contractual obligation* upon the part of the General Assembly to exempt defendant's property in said city from taxation, at the time of the passage of the Amendatory Act of 1853. Nor was there any express or implied agreement upon the part of the Legislature, to refrain from repealing, amending or otherwise changing said acts or either of them, in the future, so that defendant's property might be subjected to the payment of city taxes. The Constitution of 1820 was in operation when both the above acts were passed. It contained no language or provisions which precluded the General Assembly of this State from repealing, amending or changing said laws by appropriate future legislation. In the absence of any constitutional provision to the contrary, the Legislature was vested with the inherent power to repeal the *exemption* of 1853, supra, by permitting the inhabitants of the city of Glasgow, as shown by the record, to become a city of the fourth class, and to be governed thereafter by the provisions of same. [St. Louis v. Russell, 9 Mo. l. c. 511-12; Walden v. Dudley, 49 Mo. l. c. 422; Giboney v. Cape Girardeau, 58 Mo. 141; State ex rel. v. McReynolds, 61 Mo. l. c. 212; Kansas City v. Cook, 69 Mo. l. c. 128; Copeland v. St. Joseph, 126 Mo. l. c. 431; Drainage District v. Turney, 235 Mo. l. c. 93; Hislop v. Joplin, 250 Mo. 588; 1 Dillon on Municipal Corps. (5 Ed.), secs. 92, 355 and following; 4 Dillon on Municipal Corps. (5 Ed.), sec. 1394, page 2424; Cooley's Const. Limitations (7 Ed.), page 266; Cooley on Taxation (3 Ed.), page 111; Washburn v. Oshkosh, 60 Wis. 453; Hayward v. People, 145 Ill. 55; Town of Cicero v. Chicago, 182 Ill. 301; People v. Rock Island, 271 Ill. 412; Graham v. Green-

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ville, 67 Tex. 62; Cohen v. Houston, 176 S. W. (Tex.) l. c. 813; Winzer v. Burlington, 68 Iowa, l. c. 282; Galloway v. Memphis, 116 Tenn. 736; L. & N. R. R. Co. v. Barbourville, 105 Ky. 174; Walker v. Richmond, 173 Ky. 26; East Saginaw Mfg. Co. v. East Saginaw, 19 Mich. 259; Attorney-General v. Springwells Tp. Board, 143 Mich. 523; State ex rel. v. Kolsem, 130 Ind. l. c. 442; Toney v. Macon, 119 Ga. 83; Probasco v. Moundsville, 11 W. Va. 501; Powell v. Parkersburg, 28 W. Va. 698; Booten v. Pinson, 89 S. E. (W. Va.) 985; Camp v. State, 72 So. (Fla.) 483; McClintock v. Great Falls, 163 Pac. (Mont.) l. c. 101; City of Ensley v. Simpson, 166 Ala. 366; State ex rel. v. Thompson, 69 So. (Ala.) 461; State ex rel. v. Williams, 68 Conn. 131; Berlin v. Gorham, 34 N. H. l. c. 275; People v. Pinckney, 32 N. Y. 377; Phipps v. Medford, 156 Pac. (Ore.) 787; Mt. Pleasant v. Beckwith, 100 U. S. l. c. 529; 28 Cyc. 183.]

Section 7 of article 9 of our present Constitution provides that:

"The General Assembly shall provide, by general laws, for the organization and classification of cities and towns. . . . The General Assembly shall also make provisions, by general law, whereby any city, town or village, existing by virtue of any special or local law, may elect to become subject to, and be governed by, the general laws relating to such corporations."

The Legislature carried into effect the above provision of our Constitution, and enacted section 8527, Revised Statutes 1909, which reads as follows:

"All cities and towns in this State containing five hundred and less than three thousand inhabitants, and all towns existing under any special law, and having less than five hundred inhabitants, which shall elect to be cities of the fourth class, shall be cities of the fourth class."

Section 8530, Revised Statutes 1909, strongly relied upon by defendant, reads as follows:

"All rights and property of every kind and description, which were vested in any city under its former organization, shall be deemed and held to be vested in such city upon its becoming reorganized as provided

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in the preceding section; but no rights or liabilities, either in favor of or against such city, existing at the time of so becoming reorganized, and no suit or prosecution of any kind shall be affected by such change, but the same shall stand and progress as if no change had been made."

Article 9 of chapter 84, Revised Statutes 1909, relates to "Cities and Towns under Special Charters." Section 9582, Revised Statutes 1909, included in said article 9, reads as follows:

"Any municipal corporation in this State, whether under general or special charter, and having authority to pass ordinances regulating subjects, matters and things upon which there is a general law of the State, unless otherwise prescribed or authorized by some special provision of its charter, shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the State law upon the same subject."

The defendant in her answer, admits: "The incorporation of the city of Glasgow, as a city of the fourth class."

Taking a retrospective view of the situation, in connection with the constitutions, statutes and authorities heretofore mentioned, we deduce the following conclusions: (a) That the act of 1853, which incorporated defendant's property within the boundaries of Glasgow and exempted the same from taxation, was valid at the time of its enactment and that said exemption continued, *without* question, until, *at least*, the time of the adoption of the Constitution of 1865. (b) That when the above statute of 1853 was enacted, the Legislature had the *inherent right*—if it had seen fit to exercise it—to include defendant's property within the boundaries of said city, with or without her consent, and to have subjected the same to the payment of city taxes thereafter. (c) That the Legislature of 1853 made no express or implied agreement with defendant, by which it obligated itself to continue said exemption for all time to come. On the contrary, it had the legal right to amend said Act of 1853, after its passage, during the

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same session, or at any subsequent session, and to have subjected defendant's property therein, to the payment of city taxes. (d) That after Glasgow became a city of the fourth class, the property of defendant therein became subject to taxation, just as it would have been had said city changed from a village to a city of the fourth class. In other words, defendant's property having been included by the Legislature in 1853 within the boundaries of Glasgow, continued therein after the latter became a city of the fourth class, and subject to the general law of taxation relating to cities of such class.

II. Leaving out of consideration the Constitution of 1865, was the Act of 1853 including defendant's property within the boundaries of Glasgow, and **Constitution of 1875 and Statutes.** exempting the same from taxation therein, any longer effective, after the adoption of our present Constitution? The latter became operative on November 30, 1875. Section one of the Schedule of same reads as follows:

"The provisions of all laws which are *inconsistent* with this Constitution shall cease upon its adoption, except that all laws which are inconsistent with such provisions of this Constitution as require legislation to enforce them shall remain in force until the first day of July, one thousand eight hundred and seventy seven, unless sooner amended or repealed by the General Assembly."

Section 3 of article 10 of above Constitution provides that:

"Taxes may be levied and collected for public purposes only. They shall be *uniform* upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by *general laws.*"

Section 4 of article 10, supra, provides that:

"All property subject to taxation shall be taxed in proportion to its value."

Sections six and seven of said article, are as follows:

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"Sec. 6. The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law."

"Sec. 7. All laws exempting property from taxation, other than the property above enumerated, shall be void."

The Legislature, in the enactment of Section 11, 335, Revised Statutes 1909, provided that:

" . . . Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools or for purposes purely charitable, shall be exempted from taxation for State, county or local purposes."

It is perfectly manifest from the reading of above statutes and constitutional provisions, that they are in irreconcilable conflict with Section 3 of the Act of 1853, which reads as follows:

"The mayor and councilmen shall not have the power to levy and collect taxes on any real estate unless the same is laid off into lots, or may hereafter be laid off into lots; and no taxes shall be levied or collected on any personal property situated upon any real estate not laid off into lots within the above limits."

Ten years later, the Legislature repealed a *portion* of the above exemption as shown in Section 3 of the Acts of 1872-3, at page 236, which said section reads as follows: "That all persons residing upon real estate with-

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in the corporate limits of the city of Glasgow, heretofore exempt from taxation, shall be subject to pay a tax upon their personal property," etc.

We therefore have before us a *part* of the mere *exemption* privilege granted defendant in 1853, which was subject to repeal at will by the Legislature, and which became inconsistent with the provisions of the present statute and sections of our Constitution supra. So far as the record discloses, defendant received the benefit of said exemption from 1853 up to 1915, when Glasgow, in due form, became a city of the fourth class, and subject to the general laws relating to the latter.

III. It is insisted by respondent that the provisions of our present Constitution were intended to be prospective only in their operation, and that they should not ~~Prospective~~ be construed as a repeal of the exemptions specified in the Act of 1853. We are not favorably impressed with this contention. If the plaintiff were suing for taxes alleged to be due the city of Glasgow before the adoption of the Constitutions of 1865 and 1875 respectively, then it might be *claimed*, that the provisions of said Constitutions should not apply. When the present Constitution of 1875, however, was adopted, it said in legal effect to defendant: You shall not hereafter receive the benefit of any exemption from taxation in respect to the property in controversy under the Act of 1853. Respondent was exercising a mere privilege up to this point, subject to the right of the law-making power of the State to revoke such privilege.

In discussing this subject in *Drainage District v. Turney*, 235 Mo. l. c. 92-3, Commissioner BROWN of this court, in clear and forceful language, said:

"A retrospective law is one which creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. It must give to something already done a different effect from that which it had when it transpired.

"In this case the only ground upon which a retrospective application of this statute is asserted is that it

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applies to an object already in existence at the time of its enactment. Were this a good objection it would lead to startling results, for it could be as well claimed that no statute could be enacted imposing new duties upon or giving new privileges or rights to a person already born as that these things could not be done by the Legislature with reference to a corporation already created.

"It may be that in the third paragraph of its answer, the respondent intended to intimate that by taking him into this drainage district and thereby imposing upon him the burden of taxation to pay an indebtedness already created, some other constitutional right of his would be invaded than the one which he specified. If so he has failed to point it out. Notwithstanding the omission, however, it may not be entirely improper to suggest that it seems to be well settled in this State that the Legislature may give to a municipal corporation the power by its own unaided act expressed in an ordinance, to extend its limits so as to include the property and persons of those having no voice whatever in the transaction, and subject them to taxation for all purposes to the same extent as original members of the corporation, subject only to the qualification that such action must be reasonable. [Kelly v. Meeks, 87 Mo. 396; Copeland v. St. Joseph, 126 Mo. 417.] This being true we cannot see why a public corporation of this character invested with all the necessary power and authority to do whatever should be necessary in the execution of its public functions, could not be invested by the Legislature with authority to procure the extension of its limits by a judicial proceeding in which the reasonableness and necessity of the action is in issue."

The above quotation expresses our view of the law in regard to the matter before us. We are of the opinion that when the city of Glasgow elected to become, and did become, a city of the fourth class, defendant's property contained within the boundaries thereof became liable for the payment of the taxes sued for in this action.

IV. Defendant's counsel make the point that as defendant's property was brought within the limits of

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Glasgow in 1853 by legislative enactment, the *exemption* from taxes was one of the *inducements* for bringing said property into the corporate limits of said city, and that, hence, if the Constitution and statutes repealed this privilege, her property should no longer be considered within the corporate limits of said city. The authorities heretofore cited by counsel from this State relating to this question, are based upon the idea that, as the law which declared the exemption was unconstitutional by reason of said exemption, the right to include defendant's property within the corporate limits of said city did not exist. We are, however, dealing with an exemption here, which was *valid* when made in 1853, but was *ineffective* after the adoption of our present Constitution. The rulings of this court are not in accord with defendant's contention in respect to this matter. Even if the Legislature had, by enactment, authorized a city like Glasgow to take in and exempt from taxation property like defendant's the *exemption* would be *unavailing* because of the provisions of our Constitution. The right of the city, however, to extend its corporate limits and take in the property, would not be unauthorized merely because an illegal exemption had been provided for in taking the property into the corporate limits. The recent rulings of this court are in accord with the foregoing views. [Copeland v. St. Joseph, 126 Mo. 417; Birch v. Plattsburg, 180 Mo. 413; Hislop v. Joplin, 250 Mo. 588; State ex inf. v. Jones, 266 Mo. l. c. 198.]

The above contention of respondent has no application, however, to the present controversy, for the obvious reason that the *exemption* provided for in the Act of 1853, was *valid* when said law was enacted, and continued to be in force, *without question*, until the adoption of the Constitution of 1865. The authorities heretofore cited under Proposition I conclusively establish the right of the Legislature to repeal, amend or change the Act of 1853 at will, and without the consent of defendant and others, to whom exemption privileges may have been extended in the original act.

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We accordingly rule that the above contention is without merit when applied to the facts of this case.

V. It is conceded that Glasgow has become a city of the fourth class in due form and that the taxes sued for should be paid, if defendant's real estate in controversy is not exempt from the payment ^{Obligation to Pay Taxes.} of same. So far as the record discloses defendant's real estate has been within the corporate limits of Glasgow since 1853, and she has never paid any city taxes thereon. She has received whatever benefits flowed from her relationship to the city, and ought not to complain at this late day in being called upon to bear some of the city's burdens. The above conclusion is in accord with the expressed views of this and other courts. [State ex rel. v. Young, 259 Mo. 52; Drainage District v. Turney, 235 Mo. l. c. 92-3; Hayward v. People, 145 Ill. 55; Washburn v. Oshkosh, 60 Wis. 453; Toney v. Macon, 119 Ga. 83; Galloway v. Memphis, 116 Tenn. 736; Cohen v. Houston, 176 S. W. l. c. 813.] Many of the other authorities cited in proposition one are to the same effect.

Other questions are raised and discussed by counsel, which have been duly considered, but we do not deem it necessary to add anything to what has already been said in regard to the merits of the controversy. We are of the opinion that the trial court committed error in overruling plaintiff's demurrer to defendant's answer and in entering judgment for the latter. On the record and admissions contained in the answer, the plaintiff was entitled to recover.

The judgment below is accordingly reversed and remanded with directions to the trial court to enter a judgment for plaintiff and to otherwise dispose of the case in conformity to the views here expressed.

PER CURIAM:—The foregoing opinion of RAILEY, C., is adopted by the Court in Banc as the opinion of the Court in Banc. All the judges concur, except *Bond, J.*, who dissents.

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THE STATE ex rel. LYMAN W. FORGRAVE v.
THOMAS J. HILL et al., Appellants.

In Banc, November 17, 1917.

MANDAMUS: Against County Court: By Justice of Peace for Salary: Remedy. The Act of March 23, 1915, provided for four justices of the peace in townships containing a designated number of inhabitants, to be paid an annual salary of \$2000, payable monthly out of the county treasury. Relator was one of the four in such a township, which was the only one of the designated population in the State. He filed a written claim with the county court for salary then due and demanded payment. The court refused to allow the claim on the ground that there was no law authorizing its allowance. He then brought this suit by mandamus against the county court to compel them to pay his salary. Held, that, though the Legislature may have power to provide for the payment of salaries to justices of the peace out of the county treasury, it cannot take away from the county the right to call in question both the facts and the law on which the payment of such a salary is demanded; and since the question of whether said statute is constitutional is a judicial one, and the statute gives to relator the right to appeal from the action of the county court in refusing to issue the warrant, and he has besides the right to sue the county for his salary, he cannot proceed by mandamus against the county court to enforce that right.

Appeal from Buchanan Circuit Court.—*Hon. Thomas B. Allen, Judge.*

REVERSED.

W. H. Haynes for appellants.

(1) The relator had the right to appeal from the said final judgment of the county court to the circuit court. Secs. 4096, 4091 and 3956, R. S. 1909. (2) Where the right of appeal exists mandamus does not lie. State ex rel. v. Macon County Court, 68 Mo. 48; State ex rel. v. Marshall, 82 Mo. 488; State ex rel. v. County Court, 83 Mo. 539; State ex rel. v. Megoun, 89 Mo. 157. Where any other adequate remedy exists,

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mandamus does not lie. (3) Relator had the right to sue the county. Givens v. Daviess County, 107 Mo. 607.

Charles F. Strop and Graham & Silverman for respondent.

(1) Mandamus was the proper remedy. Neither appeal nor direct action against the county furnished respondent an adequate remedy at law. High, Extraordinary Legal Remedies (1 Ed.), secs. 17, 104; State ex rel. v. Gilbert, 163 Mo. App. 679; State ex rel. Emmons v. Farmer, 196 S. W. 1106. (2) The duties of appellants under the Act of 1915 (Laws 1915, p. 324) are purely ministerial. State ex rel. v. Gilbert, 163 Mo. App. 686; Roberts v. United States, 176 U. S. 221. (3) Ministerial officers cannot raise the constitutionality of an act as an excuse for failure to obey the same. State ex rel. v. Williams, 232 Mo. 75.

ROY, C.—This is a proceeding by mandamus in which plaintiff had judgment, and defendants have appealed.

The relator is one of the justices of the peace of Washington Township, Buchanan County, and the defendants are the judges of the county court of that county.

The Legislature passed an act entitled, "An Act entitled justice of the peace in townships containing seventy-five thousand inhabitants and not over one hundred and fifty thousand inhabitants," which was approved March 23, 1915, and is found in Laws 1915, at page 324. Section one of that act provides for four justices of the peace in each of such townships with an annual salary of \$2,000 each, payable monthly out of the county treasury. Section two provides that such officer shall, before entering on his duties as such, give bond in the sum of \$2,000 to be approved by the county court. Section three provides that the county court may require a new bond whenever any surety shall die, remove from the county or become insolvent. Sec-

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tion four requires such officer to pay all fees collected by him for his services into the county treasury every thirty days, accompanied by a sworn statement by him. Section seven provides for furnishing such justices each with an office, stationery, light and heat, and with a clerk at a salary of seventy-five dollars per month, payable out of the county treasury. That act went into effect June 19, 1915.

At that time, the relator herein, Lyman H. Forgrave, was one of the four duly elected, qualified and acting justices of the peace of said township. It is agreed by the parties herein that said township is the one in which the city of St. Joseph is situate, and that it is the only township in the State having a population of seventy-five thousand and less than a hundred and fifty thousand.

At the time said act took effect, the relator tendered to said county court a bond in the sum of \$2,000 with sufficient sureties, conditioned for the performance of his duties under such act, but the court refused to approve the same. Relator paid into the county treasury all fees for his services that had been collected by him during the time from June 19, 1915, to August 31, 1915, inclusive, accompanied with a statement of the same.

At the August term of the county court the relator filed in said court a written claim and demand for his salary as such officer for the period above mentioned, amounting to \$400, and demanded of said court that it order a warrant to be issued and drawn on the county treasury in favor of the relator for said sum. On September 15, 1915, said court, at said term, heard and considered said claim of relator, and refused to allow it, and its judgment of such disallowance was entered on its record. That entry stated that the reason for such refusal to allow such claim was because there was no law authorizing its allowance. There was no appeal from that order.

As to the pleadings, we will only say that they are sufficient to raise the points of law here discussed, and there is no contention as to the facts essential to this discussion.

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I. The parties disagree as to whether said act of the Legislature has any application to the relator herein. That act says nothing special about the **Bond**. justices then in office, and it merely provides that the justices of the peace, *before entering upon the duties of such office* shall give such bond. There is no provision for a vacancy in the office if one of the then incumbents should fail to give bond.

We do not undertake to say whether the act was intended to provide a salary for the persons then holding such offices, but we do hold that this relator is not by that act required to give any bond, and, therefore, that he is not entitled to have an order approving the bond which was tendered by him.

II. We are of the opinion that the plaintiff is not entitled to proceed by mandamus to compel the payment of the salary which he claims. The defendants claim that the above mentioned act of the Legislature is void for several reasons which we will not mention. Plaintiff claims that the county court acts merely in a ministerial capacity in passing on such demands, and that it can be compelled by mandamus to issue the warrant necessary for such payment, and that it has no power to raise the question as to the constitutionality of such act of the Legislature.

It may be conceded that an officer who acts in a purely ministerial capacity, such as a county treasurer in the payment of a county warrant properly drawn on him, may be compelled by mandamus to do the ministerial acts required of him, and that he will not ordinarily be heard to question the constitutionality of the law under which such warrant is drawn. [State ex rel. v. Williams, 232 Mo. 56.] There are numerous other cases which need not be cited.

There is a sound reason for that rule. It is this: The auditing of demands and claims of various kinds against a county is lodged generally in the county court. In the case above cited the power to audit and allow the salary of the prosecuting attorney was placed by the law in the clerk of the circuit court. The

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power and duty to audit a claim against a county carry with them the responsibility of examining into the facts and the law upon which the claim is based. If the claimant and the auditor (whether such auditor is a person or a so-called court) disagree as to the facts or the law, the county has the right to have the matter adjudicated by a judicial tribunal. If such auditor allows the claim and issues a warrant for its payment, the county treasurer acts purely in a ministerial capacity in the payment of such warrant. The treasurer in such a case is not concerned with the question of the validity of the original claim against the county.

It is true that the county court in auditing such demands does not act in a judicial capacity. There are many cases so holding. In *Reppy v. Jefferson County*, 47 Mo. 66, it was said:

“Defendant’s counsel first contend that the rejection of the claim is a judgment; that the plaintiff is concluded by it, and cannot prosecute in the circuit court. This claim is wholly untenable. The county court, in auditing claims against the county, is but its financial agent, and not a judicial body. It represents the county, and in the numerous prosecutions against it, from the earliest times, it has never been held that a rejected claim was *res adjudicata*. [Phelps County v. Bishop, 46 Mo. 68.] The idea that a disallowance of a claim operated as a judgment against the claimant has arisen in part from the fact that an appeal is allowed from such action. This, however, is but a statutory mode of bringing the county into the circuit court without original process, and the claimant may avail himself of it or commence suit.”

Sears v. Stone County, 105 Mo. 236, and *Givens v. Daviess County*, 107 Mo. 603, are to the same effect. The last case mentioned was a suit by a county treasurer for his salary. It was there said:

“It must be confessed that there seems, upon first view, to be some conflict in these sections, but we think all conflict disappears when we remember that

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the county court when engaged in auditing, adjusting and settling accounts is not acting in a strictly judicial capacity, but rather as the financial, or administrative, agent of the county, and the right of appeal from its order rejecting a claim is merely a summary and inexpensive method of commencing the suit in the circuit court. [Sears v. Stone County, 105 Mo. 236, and authorities cited.] Under this construction of these sections we think the presentation of an account to the county court for settlement would have no more effect than a demand for settlement and payment, by a creditor, to any other debtor. The failure to make such presentation would not be available as a defense unless a tender is made of the amount due as provided by section 1018."

On the other hand the county court does not act ministerially in passing on such claims. In State ex rel. v. Meier, 143 Mo. 439, a ministerial act is defined thus:

"A ministerial act is one which a public officer is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed."

It ought not to be said that the county court, in auditing such claims, acts "without regard to its own judgment or opinion concerning the propriety or impropriety of the act to be performed." The public good requires that it shall act strictly in accordance with its opinion as to the propriety of such action.

One of the latest utterances of this court, on the subject is in State ex rel. v. Diemer, 255 Mo. 336, where we find the following language:

"In the allowance of claims against a county or in settling with county officers, county courts do not act so strictly as a court, or in the performance of a judicial function, that their allowance or disallowance of a claim is *res adjudicata*. Something of substance might be said in favor of the contrary theory, but at

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an early day this court considered our statutes and announced the doctrine, on the reason of the thing and because of a good public policy, that county courts in the allowance of claims, as in settling with officers, acted as a mere public board of audit, as ministerial, administrative or fiscal agents for the county and not strictly as a court, hence we have uniformly refused to apply the doctrine of *res adjudicata* to their orders allowing or disallowing claims against the county, or to their settlements with county officers."

A long list of cases is there cited.

That case and the case of Marion County v. Phillips, 45 Mo. 75, are the only ones which we have found that use the word "ministerial" in that connection. The other cases speak of the county court as the "auditing board," the "fiscal or administrative agent" of the county. So far as we know this court has never held that the county court can be compelled by mandamus to draw its warrant in payment of a claim against the county where that claim has not been reduced to judgment. The only case which the respondent has been able to cite on that point is State ex rel. v. Gilbert, 163 Mo. App. 679. In that case the county court had by proper entry of record ordered a warrant to issue in payment of the salary of the county counsellor. The presiding judge of the county court refused to sign that warrant. In a proceeding by mandamus to compel him to do so, the Kansas City Court of Appeals, speaking of the statute which provided for the payment of the salaries of county officers, said:

"Under this section, the county court had no discretion whatever. It was bound to issue relator a warrant for each month for the amount of his salary then due, whether there was any money in the treasury or not. It was the only way in which he could get his pay as an officer of the county."

That language is clearly an *obiter dictum*. The fact that the claim for the officer's salary had been audited and a warrant ordered to issue therefor made

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it the ministerial duty of the presiding judge to sign the warrant. [R. S. 1909, sec. 3789.]

There was no occasion in that case for the court to decide whether the action of the county court in allowing a warrant for official salaries under section 10739, Revised Statutes 1909, was merely ministerial or whether it was that of an "auditing body" or "administrative agent." The county court had there done its full duty in ordering the warrant to issue, and that proceeding by mandamus was not against the county court to compel the auditing of the claim, but was against the president of that court to compel the ministerial act of signing the warrant.

III. Article 3 of our State Constitution says:

"The powers of government shall be divided into three distinct departments—the legislative, executive and judicial,—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted."

Although the Legislature may have power to provide for the payment of a salary to justices of the peace out of the county treasury, it cannot take away from the county the right to call in question both the facts and the law on which the payment of such a salary is demanded. If the county court has no right to raise the question of the constitutionality of said act of the Legislature, then the county must go on paying \$8,000 a year regardless of the question as to whether there is any valid law for such payment. It belongs to the executive (or administrative) branch of the government (in this case to the county court) to say whether it will demand that the law and the facts shall be decided by the judicial department of the government before payment is made, and the Legislature cannot

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Court.

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deprive the county of that right. In *State ex rel. Pittman v. Adams*, 44 Mo. 570, it was said:

"But an act declaring a forfeiture, if outside of legislative authority, cannot be strengthened by reciting facts that might judicially work a forfeiture, unless those facts have been judicially passed upon. An act may recite a judgment of forfeiture as a proper foundation for any legislation warranted by such judgment, but the question of forfeiture is strictly judicial, and the Legislature cannot constitutionally know either that the facts exist or their legal effect. It would be absurd to hold that we are bound by a recital of facts which the Legislature had no right to find, and by an assumption of their effect which it had no right to declare."

The question as to whether the statute in controversy here is constitutional is a judicial one. The county has the right to have that question decided by the courts before its warrant is drawn for the payment of relator's salary.

The statute gave the relator the right to appeal from the action of the county court in refusing to issue a warrant for his salary, and he still has the right to sue the county for such salary. Such being the case, he has no right to proceed by mandamus to enforce such right. [*State ex rel. Patterson v. Marshall*, 82 Mo. 484; *State ex rel. Betts v. Megown*, 89 Mo. 156; *State ex rel. Carroll v. Cape Girardeau County Court*, 109 Mo. 248.]

The judgment is reversed.

PER CURIAM:—The foregoing opinion of Roy, C., is adopted by the Court in Banc as the opinion of the Court in Banc. *Walker and Williams, JJ.*, concur; *Bond and Blair, JJ.*, concur in result; *Graves, C. J.*, and *Faris and Woodson, JJ.*, dissent.

JOSEPH A. GUTHRIE, Administrator of DAVID B. WHIMSTER, v. CONWAY F. HOLMES, Appellant.

In Banc, November 17, 1917.

1. **PRINCIPAL AND AGENT: Negligence of Automobile Driver: Liability of Owner: Presumption.** In a suit for damages against the owner of an automobile, for personal injuries due to the negligent driving of the car by the chauffeur, in the absence of the owner, proof that the automobile was owned by the defendant and that the chauffeur was in his general employment raises a presumption that the chauffeur at the time was acting within the scope of his employment and makes a *prima-facie* case against the owner resting on the presumption. But such presumption takes flight upon the appearance of evidence of real facts to the contrary.

Held by WOODSON, J., dissenting, that the court cannot hold as a matter of law that the *prima-facie* case was completely overcome and destroyed by the evidence introduced by defendant, but whether or not it was so destroyed is a question for the jury, whose province it is to determine its credibility and weigh its probative force.

2. **____: ____: ____: Failure to Observe Master's Direction.** Where the chauffeur was directed to take the automobile to the master's garage, which he could have done in an hour, and instead of doing so spent five hours or more driving over the city before (in a drunken state) he negligently ran the car against plaintiff, there is no presumption that at the time of the accident he was acting within the scope of his employment; but in order to hold his master liable for the damage, positive proof that he was in fact at the time of the accident engaged in the performance of duties for the master was required.

3. **____: ____: ____: Having Car Repaired.** The fact that, after the master directed the chauffeur to take the automobile to the garage, the chauffeur, who was an experienced mechanic, discovered a "knock" in the engine and, instead of remedying the defect himself, which he could easily have done, went to the general garage of cars of like manufacture, and there saw and took into his car the man in charge, does not establish that such trip was within his duties, even though he had been previously instructed to go to a machine shop and have some parts made. Especially is this true, where the facts show that the chauffeur for the next two hours, after making said trip and before the accident occurred, was engaged in a joy-ride and a drunken debauch.

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4. —: —: —: **Slight Deviations from Directions.** Slight deviations from the master's directions to his chauffeur, or incidental things done by him for his own benefit while in the line of his service for the master, will not destroy the presumption that the regularly employed chauffeur, at the time he negligently ran his automobile against a pedestrian, was acting within the scope of his employment. But the acts of the chauffeur in this case were not slight deviations, nor mere incidents of his employment, but destroyed the presumption.

Appeal from Jackson Circuit Court.—*Hon. Harris Robinson*, Judge.

REVERSED.

Morrison, Nugent & Wylder and *H. L. Hassler* for appellant.

(1) The evidence in the case does not make out a case of mere deviation. On the contrary, it conclusively shows that Hettenbaugh was using the automobile for his personal pleasure for a drunken carousal. The doctrine of deviation has never been applied to such a state of facts and under the evidence in the case, the demurrer should have been sustained. *Reilly v. Connable*, 214 N. Y. 586; *Danforth v. Fisher*, 75 N. H. 111, 21 L. R. A. (N. S.) 93; *Eakin v. Anderson*, 169 Ky. 1; *Steffen v. McNaughton*, 142 Wis. 49; *Douglass v. Stephens*, 18 Mo. 369; *Symington v. Sipes*, 121 Md. 313, 47 L. R. A. (N. S.) 662; *Patterson v. Kates*, 152 Fed. 481; *Tyler v. Stephan*, 163 Ky. 770; *Slater v. Thresher Co.*, 97 Minn. 305; *Garretzen v. Duenekele*, 50 Mo. 107; *Storey v. Ashton*, 38 L. J. Q. B. 223 (which in effect overrules *Sleath v. Wilson*, 9 Car. & Payne, 607); *Schoenhens v. Hartfield*, 158 N. Y. Supp. 388. (2) Plaintiff's evidence raised no presumption that the chauffeur was acting in the scope of his employment. (a) Having shown that he had been using the car for his personal pleasure, the presumption is that the same condition existed at the time of the accident. *Pope v. Cable Ry. Co.*, 99 Mo. 404; *Nelson v. Jones*, 245 Mo. 591; *Dehner v. Miller*, 166 Mo. App.

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591. (b) Presumptions arise only when based on evidence consistent therewith and sufficient to support them. 16 Cyc. 1050; Elliott on Railroads (2 Ed.), sec. 1644; Woas v. Railroad, 198 Mo. 664; Rice v. Railroad, 153 Mo. App. 43; 6 Cyc. 629. (3) In any event, the presumption is overcome by the evidence in the case. Glassman v. Harry, 182 Mo. App. 304; Hurck v. Railroad, 252 Mo. 39; Berry on Law of Automobiles (2 Ed.), p. 694, sec. 615; Hite v. Railway Co., 130 Mo. 132; Davis v. Railway, 89 Mo. 350; Sowders v. Railroad, 127 Mo. App. 119; Mockowick v. Railroad, 196 Mo. 571; Tetwiler v. Railroad, 242 Mo. 194; Lotz v. Hanlon, 217 Pa. St. 339, 10 L. R. A. (N. S.) 202; 16 Cyc. 1087; Befay v. Wheeler, 84 Wis. 135; Elliott on Railroads (2 Ed.), sec. 1213; Huber v. Railway, 6 Dak. 392; Railroad v. Talbot, 78 Ky. 621; Volkman v. Railroad, 5 Dak. 69; Grundy v. L. & N. R. Co., 8 Ky. L. R. 689.

Hogsett & Boyle for respondent.

The demurrer to the evidence was properly overruled. (1) The evidence supports a reasonable inference that the chauffeur was using the automobile to look for the defendant's garage keys. (2) Proof that the automobile belonged to defendant, and was being operated by defendant's regularly employed chauffeur, was a *prima facie* sufficient showing that the chauffeur was acting within the scope of his employment, and the burden of evidence shifted to defendant to show the contrary. O'Malley v. Construction Co., 255 Mo. 386; Shamp v. Lambert, 142 Mo. App. 575; Marshall v. Taylor, 168 Mo. App. 246; Wiedeman v. Taxicab Co., 182 Mo. App. 523; Long v. Nute, 123 Mo. App. 204; Fleishman v. Fuel Co., 148 Mo. App. 117; Vanneman v. Laundry Co., 166 Mo. App. 685; Fleishman v. Fuel Co., 163 Mo. App. 416. (3) This rule is just. For as between the injured person and the employer of the negligent chauffeur, the burden of evidence should rest upon him who is in the better position to know the facts. (4) The evidence of defendant's own chaf-

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feur affirmatively shows that the chauffeur was acting within the scope of his employment. (5) Hettenbaugh's drunkenness is no defense. Whether drunk or sober, he was defendant's regularly employed chauffeur; and if he was acting within the scope of his employment defendant is liable. *Whimster v. Holmes*, 177 Mo. App. 135. (6) The evidence that other persons were in the automobile with Hettenbaugh at the time of the injury is weakened by the testimony of Dr. Whimster, and by the circumstance that at least one of the witnesses confused defendant's automobile with some other automobile entirely. (7) It is for the jury, not the court, to say which inference shall be drawn from the circumstances shown by the evidence. *Linderman v. Carmin*, 255 Mo. 62; *Finnegan v. Railway*, 244 Mo. 653; *Hall v. Coal Co.*, 260 Mo. 351; *Gilky v. Woodmen*, 178 S. W. 875; *Merritt v. Telephone Co.*, 215 Mo. 299; *Luehrmann v. Light Co.*, 127 Mo. App. 213; *Pohlmann v. Foundry Co.*, 123 Mo. App. 219. (8) After verdict in plaintiff's favor, the evidence must be viewed in the light most favorable to plaintiff, and where two inferences may reasonably be drawn from the evidence, the appellate court will adopt that one which is in aid of the verdict. *St. Louis v. Packet Co.*, 214 Mo. 638; *Hall v. Coal Co.*, 260 Mo. 351; *Dunn v. Railway*, 192 Mo. App. 260; *Allen v. Railway*, 189 Mo. App. 272; *Merritt v. Matchett*, 135 Mo. App. 176; *Giddings v. Railway*, 133 Mo. App. 610. (9) But even if defendant had produced direct evidence tending to show the chauffeur was not within the scope of his employment, the credibility and weight of such evidence was still for the jury. *Gannon v. Gas Light Co.*, 145 Mo. 516; *Mowry v. Norman*, 204 Mo. 193; *Printz v. Miller*, 233 Mo. 47; *Link v. Jackson*, 158 Mo. App. 90; *Winn v. Woodmen*, 157 Mo. App. 11; *Troll v. Home Circle*, 161 Mo. App. 719; *Davidson v. Railway*, 164 Mo. App. 715; *Clouts v. Gas Light Co.*, 160 Mo. App. 473. (10) The fact that some keys were found on Hettenbaugh after his arrest cannot avail defendant as a matter of law, because: it was a matter

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going at most to the credibility of Hettenbaugh's testimony; there is no evidence that the keys found on Hettenbaugh were the garage keys; even if the garage keys had been found on him, this proved nothing, for possibly Hettenbaugh had actually found the keys before running over plaintiff; even if Hettenbaugh had never in fact lost the keys in the first place, yet if he thought he had, and started out with the car to look for them, the legal effect of his conduct would not be affected by the fact that he was mistaken about having lost them. (11) In cases where there is no direct evidence upon a point, it is competent for the jury to draw from the circumstances proved an inference as to the ultimate fact in issue. *Meadows v. Insurance Co.*, 129 Mo. 76; *Buesching v. Gas Light Co.*, 73 Mo. 219; *Wack v. Railway*, 175 Mo. App. 111; *Johnston v. Railway*, 150 Mo. App. 304. (12) On the former appeal defendant successfully contended that there was evidence showing whether Hettenbaugh was within the scope of his employment. Now defendant contends there is no evidence showing this. Defendant cannot thus shift positions. *Tower v. Imp. Co.*, 192 Mo. 393; *Coney v. Laird*, 153 Mo. 435; *McClure v. Clement*, 161 Mo. App. 30; *Davis v. Wackerle*, 156 U. S. 689.

GRAVES, C. J.—This case reaches us upon a proper certification from the Kansas City Court of Appeals, there being a dissenting judge who deemed the majority opinion in conflict with opinions of this court, and expressed of record such views in an opinion filed.

The case was twice before the Kansas City Court of Appeals. First it was held (*Whimster v. Holmes*, 177 Mo. App. 130) that there were facts sufficient to take the case to the jury, but the judgment for plaintiff was reversed and cause remanded for error in an instruction. Upon a retrial plaintiff again received a verdict at the hands of the jury, and from a judgment thereon the present appeal arises. Upon a sec-

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ond hearing in the Court of Appeals, the division of opinion occurred, and the dissenting judge now takes the position that the plaintiff failed to make a case.

That the evidence on the second trial must have been materially different from that upon the first is made clear by rulings in the first opinion. Thus in the first opinion we find this recited fact:

"And it was further shown that he was to overhaul the car and make some repairs during the absence of defendant, consulting with an expert in a certain public garage in the city."

No such statement of facts could be made on the present record, and from it we conclude the evidence before us is quite different from the record in the first appeal. However, we shall state the facts, as we find them in this record.

In March or April, 1912, the defendant employed one H. L. Hettenbaugh, as a chauffeur, and to take care of his two automobiles. Hettenbaugh was not only a chauffeur, but was an automobile mechanic, having had experience in repair shops. On July 10, 1912, defendant and his family and some others were going away from Kansas City, and Hettenbaugh drove defendant's wife, some members of his family and perhaps a Mrs. Edson, to the railroad station at Second and Wyandotte streets. Defendant had two automobiles, one a Packard touring car, used by Hettenbaugh on this occasion, and the other a Packard roadster, driven to the depot by defendant on this occasion. Defendant drove to the station, shortly before the time of the train's departure, and whilst there directed Hettenbaugh to take two acquaintances up town and then to take the car home. One of these acquaintances was to be taken to the Dwight Building at Tenth and Baltimore and the other to the Baltimore Hotel at Eleventh and Baltimore. There is no question as to the directions given Hettenbaugh at this time. The day before his departure, it appears that defendant had directed Hettenbaugh to thoroughly overhaul his cars, if he had time so to do, and especially the road-

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ster. Defendant, himself, only expected to be absent some ten days. No directions were given about consulting Rogers, or any other expert about either of said cars. Instead of the record showing that such directions were given, as indicated in the first opinion of the Court of Appeals, this record shows that they were not given. It is true that Hettenbaugh says that on two or three previous occasions defendant had directed him to consult with one Rogers, at a garage at Thirty-fourth and Broadway, but there were no such directions at this time.

Defendant lived at the intersection of Harrison Street (a north-and-south street) and Armour Boulevard. From the Baltimore Hotel, where the last passenger was to be left, to defendant's home was in a southeasterly direction.

We have given the directions of defendant to Hettenbaugh. In the instant case it is admitted that the plaintiff was injured through the negligence of Hettenbaugh whilst driving the defendant's car. The accident and injury occurred at Nineteenth Street and Grand Avenue about 7:30 in the evening. Hettenbaugh left the railway station at shortly after 1:30. It would require him about ten minutes to deliver the two passengers to their respective places and then thirty to forty minutes to drive the car to defendant's home. By 2:30 at least, had defendant's directions been followed, his car would have been in the garage back of his residence. The doings of Hettenbaugh become material at this point. He says (and in this case two depositions of Hettenbaugh were introduced in evidence by the plaintiff) that after delivering the passenger at the Baltimore Hotel, he drove back a block to the Dwight Building, wherein was the Pioneer Trust Company (with which defendant appears to have been connected) to get his check cashed, where he had to remain until after three o'clock for that purpose. He then started south on Grand Avenue in the direction of defendant's home. At Twelfth and Grand Avenue he stopped to get his laundry. At Seventeenth and

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Grand Avenue he stopped and talked with a friend by name of Davis (who was in the automobile business, but no talk about his car), and in a near-by section took a drink of liquor. He says that there was a knock in the engine of the car, and he concluded to drive to a public garage at Thirty-fourth and Broadway to consult one Rogers, who was an expert on Packard cars. That he took Rogers in the car and they drove to Fortieth and Broadway, as he says, so that Rogers might observe the car. Rogers says he was not advised with about the car at all, but that they took a drink at a saloon at that street intersection. In making this trip to Thirty-fourth and Broadway Hettenbaugh had gone considerably west and much south of defendant's residence, and his arrival there was about four o'clock in the afternoon. After returning to the garage with Rogers, Hettenbaugh went south on Main Street to Thirty-seventh and Main, his home, where he arrived, as he says, about five o'clock. About six o'clock he retraced his route, and seeing Rogers about to take a street car for his (Roger's) home took him in the car to take him home. Hettenbaugh had a young man with him at this time. Rogers was picked up at Thirty-third and Broadway. Thence the three went north to Fifteenth and Grand Avenue where they stopped at a saloon and got another drink. At this time Rogers noticed that Hettenbaugh was a little talkative, and he took the wheel and drove the car himself, with Hettenbaugh in the seat beside him. From this saloon Rogers drove east on Fifteenth Street to the Paseo, and thence south on Paseo to Howard, and thence east on Howard Street to Parke Avenue, his home. The car was then a mile and a half or more northeast of defendant's residence, and it was nearly seven o'clock in the evening. What became of the young companion does not appear. The doings of Hettenbaugh from the time he left the home of Rogers had better appear in his own language. His deposition was twice taken—once by plaintiff, and once by defendant—but both depositions were read in evidence by the

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plaintiff in this second trial. It is largely upon these depositions that the Court of Appeals (majority opinion) find the liability of the defendant. In his deposition given on October 11, 1912, Hettenbaugh says:

"Q. Well, now, where did you go from Rogers' place, Mr. Hettenbaugh? A. I don't know. I could not answer that question properly.

"Q. Have you any recollection at all about it? A. Well, I have a faint recollection, but I could not be positive.

"Q. Well, what is your best recollection? A. My recollection is that I went on south from there, intending to go to the garage; that is, to his home, and put the car away, but it seems to me that when I got nearly to the place, I missed my keys, and whether I left them one place or another, I don't know, and never found them, and haven't found them yet, as far as that goes.

"Q. What keys do you refer to? A. The keys to the cars and the garage. They were on a ring.

"Q. Was the garage kept locked at all times? A. Yes, sir.

"Q. State whether or not you had received instructions from Mr. Holmes to keep the garage locked? A. Yes, sir; that was the first instruction that I got when I went to work for him.

"Q. What did you do then, when you missed your keys, Mr. Hettenbaugh? A. I couldn't answer that question for certain.

"Q. What is your best recollection? A. The only recollection that I have, I missed my keys—it seemed to me I did. Further than that, I don't remember any more. *I don't know where I went after that.*

"Q. Well, do you have any recollection of starting out to look for your keys?

"Objected to as leading and suggestive. Objection overruled.

"A. No, I have no other recollection of going to look for the keys, but as I remember it, I went back to the garage, and looked for my keys there, and they were gone. Further than that I cannot remember.

"Q. What was the next thing you do remember, Mr. Hettenbaugh? A. Well, the next thing I can remember, was that I woke up in No. 1 Police Station. That is about all I can tell you. I didn't know where I was then, but I found out pretty soon.

"Q. You have no recollection of running into anybody? A. Why, yes, I have a faint recollection of the accident of Fifty-second and—

"Objected to for the reason that it is leading and suggestive. Objection overruled.

"Q. Go on. A. I have a faint recollection of running into a man at Fifty-second and Oak, although I didn't have at that time. But since I have thought about it, thought it over, and studied over it, I think I remember of it now.

"Q. Do you recollect whether it was a man you ran into at Fifty-second and Oak, or another machine, which? A. Another machine, that I run into there, I think. As far as I can recollect.

"Q. You have no recollection of running into a man at Nineteenth and Grand? A. No, sir.

"Q. Then, if you were driving this car on Grand about Nineteenth Street, that afternoon, after you missed your keys, you do not know where you were going?

"Objected to as leading and suggestive. Objection sustained.

"Q. Do you have any recollection of driving your car on Grand near Nineteenth Street that afternoon, after you missed your keys? A. No, sir, I haven't.

"Q. Mr. Hettenbaugh, how did you come to go out to see Mr. Rogers about the car? A. How did I come to go out there? For a little information, I told you.

"Q. State whether or not you received any instructions from Mr. Holmes to consult Ben Rogers about repairs on the car?

"Objected to as leading and suggestive. Objection overruled.

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"A. No, sir.

"Q. Was anybody with you after you left Rogers out at his place, Mr. Hettenbaugh? A. Not that I know of.

"Q. Do you know why it is, Mr. Hettenbaugh, that you are unable to recollect what occurred after that time? A. No, not unless it was that I had had too many highballs. That's the only reason I know. You wanted the truth, and I am giving it to you.

"Q. You say, Mr. Hettenbaugh, that Mr. Holmes never told you to consult Mr. Rogers? A. That is not the question you asked me.

"Q. Did he ever tell you to consult Mr. Rogers?

"Objected to as immaterial, incompetent, and irrelevant. Objections overruled.

"A. Not that I remember of.

"Q. At any time? A. I don't see that any other time has anything to do with it.

"Q. Well, it has. A. Yes, regarding other times he did.

"Q. How many times did you consult Mr. Rogers about it, Mr. Hettenbaugh—about Mr. Holmes's car? A. Twice or probably three times.

"Objected to as immaterial, what happened on other occasions. Objection sustained.

"Q. As I understand it, Mr. Hettenbaugh, you do not recollect anything where you went or what occurred, after you missed your keys? A. Well, no, not exactly, only the accident at Fifty-second and Oak.

"Q. Do you know what time in the evening that was? A. No, I could not say what time it was. I couldn't swear to it myself; they say it was about twenty-five or fifteen of eight. That is the time they say. Fifteen of eight, I think.

"Q. You were still driving the seven-passenger Packard which belonged to Mr. Holmes? A. Certainly."

May 16, 1914, the defendant took the second deposition at Pasadena, California. The whole of the second deposition reads:

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"Q. Mr. Hettenbaugh, where do you live at the present time? A. 258 North Vernon, Pasadena.

"Q. What is your name in full, please? A. Howard L. Hettenbaugh.

"Q. 'Howard L.' you say? A. Howard L. Hettenbaugh.

"Q. Are you the Howard L. Hettenbaugh that at one time acted as chauffeur for Mr. Holmes, the defendant in this case? A. Yes, sir.

"Q. And you are the same Howard L. Hettenbaugh whose deposition was taken by the plaintiff in that case on or about the 11th day of October, 1912? A. Yes, sir.

"Q. Without expecting you to remember the exact date, you remember of giving your testimony? A. Yes.

"Q. And you are the man who was driving the car, the Packard automobile, of Mr. Holmes, on the night that this accident is alleged to have occurred? A. Yes, sir.

"Q. I think you have already testified that you have no recollection of being at the scene of the accident at the time when they allege? A. What accident?

"Q. Well, the place where Mr. Whimster alleges he was hurt. I believe you have already stated you have no recollection? A. No, sir.

"Q. Now, Mr. Hettenbaugh, when your deposition was taken the following question and answer was asked you: 'Q. Well, what is your best recollection? A. My recollection is that I went on south from there, intending to go to the garage; that is, to his home, and put the car away; but it seems to me that when I got nearly to the place I missed my keys, and whether I left them one place or another, I don't know. I never found them, and haven't found them yet, as far as that goes.' Now, you remember having so testified, do you, as I have read to you? A. Yes.

"Q. Or substantially that way? A. Yes.

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"Q. The keys you referred to were the keys of the garage, I believe; Mr. Holmes's garage? A. Yes, sir. Also some of my own keys on the ring.

"Q. I suppose you had a ring on which you kept your own private keys? A. Yes.

"Q. And the keys to the garage? A. Yes.

"Q. Do you remember what you did after you missed your keys? A. The only thing I remember that I might have done was to have gone to look for the keys. But I don't know where; I have no recollection of where I went, definitely.

"Q. You don't remember definitely whether you went to Mr. Holmes's garage, or the Packard garage, or where you went, any place, do you? A. No.

"Q. And you have no definite recollection of even looking for the keys, have you, now, Mr. Hettenbaugh? A. Well, I have a recollection that I went there and missed the keys, and then went to look for them. Now, I would have no other mission out with the car that time in the evening.

"Q. Well, I mean you have a recollection that you missed them just before you got to his garage? A. Yes.

"Q. You haven't any recollection whether you went to the garage or not? A. Well, I couldn't say for sure that I stopped at the garage or that I didn't. As a possible chance, I may have stopped at the garage, but I would not want to say positively.

"Q. What I mean is, everything is a sort of blank, or hazy, after that, isn't it? A. Yes, sir; I don't remember clearly. Anyway, I could not prove it; if I thought I remembered something I could not have any proof for it.

"Q. And you have no recollection of looking any place, have you? A. Any particular place, you mean.

"Q. Any particular place. A. No.

"Q. You have no definite recollection, as I understand, of having reached Mr. Holmes's garage? A. Well, no; not except near there.

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"Q. Well, that is what I mean. But I mean getting right up to it? A. I remember being on the street where the garage was located; but I couldn't swear that I even went up into the garage, because, if I missed my keys it would stand to reason I couldn't get in the garage; because, if I missed my keys it would stand to reason I couldn't get in the garage if I didn't have my keys.

"Q. Well, you don't remember now that you ever got up there to see if the door was locked? A. No; I couldn't state positively that I went up to look if it was locked or not.

"Q. Now, you have no definite recollection of returning to the Packard garage, either, have you? A. Not definitely, no.

"Q. Now, Mr. Hettenbaugh, you hadn't been at Nineteenth and Grand at any time before you missed your keys had you? A. Do you mean stopped there or passed there?

"Q. Passed there. A. Certainly; I had to pass Nineteenth and Grand in order to go home, if I went the direct route.

"Q. You went the direct route. Well, you have no recollection of returning there? A. No, sir.

"Q. To look for the keys, or returning there at all, have you? A. No, sir.

"Q. Now, in your previous deposition, following the question which I have asked you, you were asked the following question: 'Q. Well, now, have you any recollection of starting out to look for your keys? A. No; I have no other recollection of going to look for the keys, but, as I remember it, I went back to the garage and looked for my keys there and they were gone. Further than that I can't remember.' A. I couldn't look in the garage for the keys unless I had the key to the garage, you understand.

"Q. Well, now, that is the way your testimony appeared? A. Well, there is a miscue of it there some place. The typist may have made a mistake, or something; but I didn't mean it that way.

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"Q. Let me finish my question. The question and answer I have read you appear to be part of your deposition as the same has been furnished me in the printed record in this case. Now, did you mean to testify that you went to a garage to look for your keys? A. No, sir.

"Q. That is a mistake, is it? A. It is a mistake. I mean to testify that I went toward the garage or to the garage, very near to the garage, and missed my keys and then went to look for them.

"Q. I see. When you said 'the garage,' 'going nearly to the garage,' you were referring to Mr. Holmes's garage? A. I didn't mean it that way. It is a mistake. Mr. Holmes's garage was the garage I was to have went to.

"Q. When you told me just a minute ago that you missed your keys when you were nearly to the garage, you meant Mr. Holmes's garage? A. I mean Mr. Holmes's garage.

"Q. Then, the answer that you have apparently given in your former deposition, that you went to a garage, you say is a mistake? A. Well, Mr. Holmes's garage is the garage I meant; but I didn't mean I went to the garage to look for the keys. I meant I went to the garage, and when I got there I missed my keys and then went to look for them.

"Q. Well, then, this answer that I have read to you, 'No; I have no other recollection of going to look for the keys, but, as I remember it, I went back to the garage, and looked for my keys there and they were gone,' that is a mistake? A. I didn't mean that I looked in the garage. I looked for the keys in my pocket.

"Q. That is where you meant? A. Yes.

"Q. You didn't mean by that answer that you went back to the Packard garage for your keys? A. No, not in particular. I may have gone there, but I didn't mean that in that statement.

"Q. Well, that garage that you referred to was Mr. Holmes's garage? A. Was Mr. Holmes's garage.

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"Q. And when you say you may have gone to the Packard, you don't know whether you did or not? A. No; I would not say.

"Q. You have no recollection one way or the other? A. No, sir.

"Mr. Sterry: That is all.

"Cross Examination by Mr. Sanford.

"Q. Do you have a distinct recollection of looking for your keys? A. Yes; I have a recollection of going to look for my keys—going to the garage first and missing my keys and then going to look for them.

"Q. When you say 'going to the garage,' you mean going up to near the garage? A. Yes; within a block or two, anyway.

"Q. Mr. Sterry: That is, Mr. Holmes' garage?

"Q. Mr. Sanford: Yes. That is, Mr. Holmes's garage? A. Yes.

"Q. It is possible that you may have gone to the Packard garage subsequently to missing your keys, in your search for them?

"Mr. Sterry: I want to enter an objection, on the ground that the question is leading and suggestive, and that this is merely a continuation of the former deposition and would be a cross-examination of your own witness and a leading question.

"A. Yes, sir.

"Mr. Sterry: Mr. Sanford, in making objections, if I should make any future objections on the ground that it is leading you will not require me to take up space by repeating that it is on the theory that this is a continuation of a former objection?

"Mr. Sanford: No.

"Mr. Sterry: But you will understand that that is the ground on which I base any objection to a question as leading?

"Mr. Sanford: Yes.

"Q. I believe you have testified that it would be impossible to get into the garage without your keys? A. Yes.

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"Q. And that Mr. Holmes had instructed you to always keep the garage locked?

"Mr. Sterry: Object to that on the ground that it is leading and suggestive, calling for hearsay testimony; that it is incompetent, irrelevant and immaterial.

"A. Yes, sir.

"Mr. Sanford: I don't believe I will ask any more questions. That is all.

"Redirect Examination by Mr. Sterry.

"Q. Mr. Holmes's son had a key to the garage, too did he not? A. Yes.

"Q. Of course you can't say whether he might not have left the garage open, or not, can you? A. May I explain that?

"Q. Sure. A. Well, I don't know positively that he had a key to the garage, or whether he got Mr. Holmes's key; but I think that the three of us had a key to the garage.

"Q. Well, then, it would have been possible for the garage to have been left open by Mr. Holmes's son if he had a key? Is not that so? A. Yes; provided he got there before I did.

"Q. That is what I say. You have no recollection of going up to see. As I understand your testimony, you may have gone to the door and found it locked; and you may have taken it for granted it was locked? A. Yes.

"Mr. Sterry: I think that is all.

"Recross Examination by Mr. Sanford.

"Q. Did Mr. Holmes's son live with him? A. No, sir.

"Q. He didn't live there? A. No, sir.

"Q. Do you know where he did live? A. He lived on Paseo Boulevard. I can't remember the number, though; but it was thirty-four and something, I think. It was on Paseo between Linwood and Armour.

"Q. That is about how many blocks from where Mr. Holmes, Senior, lives? A. About seven or eight blocks, I judge.

"Mr. Sanford: That is all.

"Direct Examination by Mr. Sterry.

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"Q. He was driving the little Packard that day, was he not? A. Both Packards were the same size, except one was a touring car and the other was a roadster.

"Q. I mean Mr. Holmes's son was driving the roadster that day? A. Yes, sir.

"Q. And he left it —A. From the depot.

"Q. From the depot? Well, that is what I meant. You didn't drive the runabout at all? A. No, sir.

"Q. And the runabout was always left at Mr. Holmes's garage, was it not? A. Yes, sir.

"Q. You are regularly employed as a chauffeur, now, in Pasadena, are you not? A. Yes, sir."

From evidence other than Hettenbaugh it is shown that he negligently ran into plaintiff at Nineteenth and Grand Avenue whilst plaintiff was in the act of boarding a street car, then standing and waiting for the reception of passengers. That there were other parties in the car with Hettenbaugh at the time of this collision there can be no question under the proof. The number ranges from two to four, in addition to Hettenbaugh and some of them were women according to some of the witnesses. Hettenbaugh was driving south on Grand Avenue at the time of the accident and continued south, at the rate of about twenty miles per hour. The accident occurred about 7:30 in the evening. The street car man, who reported it to his company, by referring to his report fixes it at 7:33. Shortly before eight o'clock, or about eight o'clock, Hettenbaugh and the car were again heard of at Fifty-second and Oak streets, where he had a head on collision with the car of George B. Calvin. Mr. Calvin got out of his car and started toward Hettenbaugh, and Hettenbaugh ran and got on the running board of a car which was passing. His conduct was such that Mr. Moore, the owner of the car, knocked him from the car and down to the street, after running a couple of blocks. Shortly thereafter a police ambulance picked him up and took him to an emergency hospital for treatment. He was drunk at this time, but roused up about midnight and was placed in the police holdover. In his car were found three bottles (unopen-

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ed) of beer, and some tops to beer bottles. The police surgeon says that he had some money, an abstract of title, two bunches of keys and some wrenches on him when picked up by the ambulance. The money and abstract he took and the next day gave them to Hettenbaugh's wife. The other things he put back in his pockets. The police records show that he had keys and automobile wrenches on his person when he was searched at the holdover. The foregoing fairly states the facts of this quite lengthy record.

I. The law of this case should not be difficult. A sifting of the facts, and the application of sound rules of law, is the tedious process required at our hands. By respondent it is urged:

"Proof that the automobile belonged to defendant, and was being operated by defendant's regularly employed chauffeur, was a *prima-facie* sufficient showing that the chauffeur was acting within the scope of his employment, and the burden of evidence shifted ^{Presumptions.} to the defendant to show the contrary."

We are inclined to the view that this does not too broadly state the presumption of fact (which arises from proof of ownership of the car and proof of the general employment of the chauffeur) to the effect that such chauffeur was within the scope of his employment. To state it differently, if it be proved (as here) that the car was owned by defendant, and if it be further proved (as here) that the chauffeur was in the general employment of defendant, then the presumption arises that such chauffeur was within the scope of his employment when the accident occurred. This, however, is as broad as the rule goes. From such a showing the plaintiff has a *prima-facie* case resting upon this presumption. Presumptions of this character (like all presumptions as to a fact in a case) take flight upon the appearance in evidence of the real facts. In Berry on Law of Automobiles (2 Ed.), section 615, p. 694, the doctrine is well stated:

"This presumption cannot stand in the face of positive proof of facts to the contrary; and where the

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plaintiff has relied upon such presumption and it has been opposed by positive evidence to the contrary, he must then produce evidence tending to disprove the defendant's positive testimony, or his *prima-facie* case will fall. The presumption in question is rather a frail thing. It is unlike an inference that arises upon the proof of certain facts, and which is necessarily true if the facts are true. It rests upon the facts that the automobile was owned by the defendant and that the chauffeur who was operating it was in the general employment of the defendant; neither one or both of which actually tends to prove that the chauffeur was engaged in the owner's business."

To like effect is the opinion of WILLIAMS, Commissioner, in Hurck v. Railroad, 252 Mo. l. c. 48, whereat he said:

"The above stated exception to the general rule is, it will be seen, wholesome doctrine, for if either by plaintiff's own evidence or by the evidence offered by defendant it appears that the unusual happening (which by its very nature raises the presumption of negligence) was caused solely by *vis major*, or by any other instrumentality disconnected from any negligence of defendant, the presumption is undermined and falls and no case is made, and in that situation the plaintiff must fail unless he goes forward with evidence showing specific negligence."

In that case the plaintiff was relying upon presumptive negligence. A train had been derailed, and the plaintiff injured. The defense was that the derailment was occasioned by an act of God.

In Sowders v. Railroad, 127 Mo. App. 119, NORTON, J., thus states the rule as to presumptions of the character here invoked. He says:

"All presumptions of fact proceed from other facts in proof (Lawson on Presumptive Evidence, 652), and supply an omitted fact in accord with the dictates of human experience on like questions. They are therefore rebuttable or disputable as a matter of course. Inasmuch as such presumptions merely amount to an as-

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sumption of what may be true, as indicated by the probabilities and the rationale of experience they may be entirely overcome or removed from the case by competent proof going to supply the fact presumed. [Lawson on Presumptive Evidence, 559; 22 Am. & Eng. Ency. Law (2 Ed.), 1235-1236; Morean v. Branham, 27 Mo. 351; Ham v. Barret, 28 Mo. 288.] And it is the well-established law that a presumption of fact will not be permitted to contradict or overcome facts actually proved. [Lawson on Presumptive Evidence, 659; Whittaker v. Morrison, 44 Am. Dec. 627; Morton v. Heidorn, 135 Mo. 608-617.]”

In the case at bar the defendant at about 1:30 p.m. directed this chauffeur to take his car to the garage at his home. Both the evidence for the plaintiff and for the defendant shows this fact. The evidence shows that an hour's time was ample for this purpose, after making liberal allowances for time to deliver the two passengers that defendant placed in his custody. This accident did not occur until 7:30 or some six hours after the directions were given to the chauffeur, and five hours after he should have had the car in defendant's garage. With this showing it would be to strain the law to say that at 7:30 there was the presumption of fact that the servant was about his master's business. This showing of facts destroyed the presumption, and it then became the duty of plaintiff, in order to make a case for the jury, to show as a fact, that at the time of the accident (7:30 p. m.) the servant was in fact about his master's business. The trip to see Rogers at Thirty-fourth and Broadway can not be considered within the scope of his duties, because both Hettenbaugh (plaintiff's witness) and the defendant, say that Hettenbaugh had been given no such directions at that time. So that we reiterate, that it was for the plaintiff to show (not for the jury to presume from the fact that defendant owned the car and had Hettenbaugh in his general employment) that at the time of the accident the chauffeur was in fact engaged in the performance of a duty for the master. The majority opinion of the Court of Appeals concludes that

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the trip to see Rogers was one within the duties of the chauffeur. We cannot view it in that light under this evidence. The evidence all agrees that there was no such direction from the master, although there was a direction to go to a machine shop and have some parts made. The "knock" in the engine is shown to have been caused by carbon in the cylinder. Hettenbaugh was an experienced mechanic and it appears was paid good wages for that reason. No good reason appears in the evidence for this trip to Rogers, because the experience of Hettenbaugh was such that he could have remedied that trouble. Nor was it shown that defendant even had knowledge of this "knock" in the engine, when he gave the directions. Because the master may have previously directed that the car be taken to Rogers for work thereon, is not sufficient to license Hettenbaugh, the chauffeur and mechanic to go there at this time, and for the purpose indicated by his evidence in this record. When said chauffeur failed to return the machine to defendant's garage as he was directed, and spent some five hours or more driving over the city, it required proof positive that he was on a mission for the master at the time of the accident, in order to hold the master.

II. By what we have written above, we do not mean to say that slight deviation from a direct route to defendant's garage, would exonerate the master from the negligence of the servant, nor do we mean that slight things done by the chauffeur for his own benefit, which

Slight Deviations. were mere incidents, whilst in the line of his service of the master would destroy the presumption. To be explicit, it appears that this servant stopped at Thirteenth Street and Grand Avenue for his laundry. He was then within reasonable lines of his direction to the home. Such an incident might be considered as merely incidental, and not necessarily out of line of his duty to the master. But what we do mean to say is, that the great number of things in this record prior to the accident, when considered with the directions given to the chauffeur, is sufficient to destroy

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the presumption, and render it necessary for the plaintiff to make proof of the fact, that the agent was in the service of the master at the hour of the accident.

The rule announced in *Daily v. Maxwell*, 152 Mo. App. l. c. 426, is a reasonable one. It reads thus:

“All the authorities are in accord in holding that in an action based on the negligent running of an automobile the owner of the car who was not present at the infliction of the injury cannot be held liable except it be shown that the person in charge not only was the agent or servant of the owner, but also was engaged at the time in the business of his service. [Evans v. Automobile Co., 121 Mo. App. 266; *Lotz v. Hanlon*, 217 Pa. 339: *Slater v. Thresher Co.*, 107 N. W. 133; *Patterson v. Kates*, 152 Fed. 481; *Reynolds v. Buck*, 103 N. W. 946; *Clark v. Buckmobile Co.*, 94 N. Y. Supp. 771; *Howe v. Leighton*, 75 Atl. 102; *Jones v. Hoge*, 92 Pac. 433; *Lewis v. Amorous*, 59 S. E. 338.]

“Where a chauffeur, either with or without his master’s consent, uses the machine for his own business or for his own pleasure and negligently inflicts injury on another, the master cannot be held liable, for the reason that the negligent act being entirely outside the scope of the servant’s employment, cannot call into action the rule of *respondeat superior*. The fact of consent is material only in the solution of the issue of whether or not the use of the machine was, in fact, on business of the master.”

To this should be added that if the ownership of the car be shown to be in defendant, and the chauffeur is shown to be in the general employ of the defendant, then there would be a presumption that he was in the service of the master at the time, which presumption would take flight upon the appearance in evidence of the facts themselves.

III. From the foregoing conclusions it becomes necessary to examine the facts and determine whether or not there is substantial evidence in behalf of the plaintiff,

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tending to show that Hettenbaugh was, as a fact, in the performance of a duty for the master at the time of the accident. The only evidence on this point is that of Hettenbaugh in the two depositions. The only duty is the alleged hunting of the garage keys, which were supposed to be lost. It is urged that Hettenbaugh might have retraced his steps and gone back to his first stops at Twelfth and Grand Avenue and at Seventeenth and Grand Avenue for the purpose of finding his keys. Hettenbaugh says he does not know where he went. Again it is shown that he had a companion with him when he took Rogers home shortly before seven o'clock. At the very instant of the accident he had persons in the automobile with him. This was at 7:30 and at Nineteenth and Grand Avenue. In about fifteen or twenty minutes he collided with another car at Fifty-second Street, at which place three bottles of beer were found in his car, as well as tops which came from beer bottles. It is true he had no companions then, and where he left them is not known, but that he did have them when the accident occurred there is no question under this proof. Hettenbaugh says that he did not know that he struck plaintiff. Putting all these facts together, they comport more nearly with the idea that Hettenbaugh was out on a drunken joy-ride, rather than with the idea that he was searching for lost keys. Remembering that he knew nothing of hurting the plaintiff, upon what theory could it be said that he was returning from a trip to recover lost keys, when he was found at Fifty-second Street, a great distance (two to three miles) south of the master's garage. The whole facts tend most strongly to show that when arrested he was winding up a debauch which began early in the afternoon at Seventeenth Street and Grand Avenue. Then again, when his evidence is read, it is clear that his recollection of what occurred after he left Rogers at about seven o'clock is too hazy to be of much value. He says he does not know where he went after reaching the neighborhood of the defendant's garage. If he returned to

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places where he had been during the afternoon to look for keys, no doubt more substantial evidence could have been secured. In the dissenting opinion of Judge JOHNSON he sets out most of the evidence from Hettenbaugh, which we have set out. [190 S. W. l. c. 68.] He then says:

"Such testimony is wholly worthless and it should be held that there is no proof in the record of the movements of the chauffeur from the time he and his companion left Rogers at Twenty-fourth and Park at 6:40 p. m. until 7:30, the time of the injury. This we do know: He returned downtown, gathered up more companions and proceeded south on Grand Avenue—not to return to defendant's residence—there is no evidence of such intention—but to drive out into the country south of Kansas City. There is evidence that some of the occupants of the car were women and there were bottles of beer aboard. Finally at about eight o'clock p. m. they met disaster at Fifty-second and Oak Streets about two and a half or three miles south of defendant's home, where they had a head-on collision with another car. The chauffeur, drunk and excited, tried to escape from the scene, but in a fight that followed, was knocked senseless and afterwards taken to police headquarters and lodged in jail. One of the city physicians, who was not a witness at the former trial, testified that he went in the ambulance to the scene of the wreck and found the chauffeur lying on the pavement wounded on the head and in a state of intoxication. He searched his pockets, finding money, an abstract of title, automobile tools and two bunches of keys. He took charge of the money and abstract for safe-keeping, and returned the tools and keys to the chauffeur's pockets. The property clerk at police headquarters, also a new witness introduced by defendant, produced the records of his office which show that a chain, a wrench and 'two keys' were taken from the chauffeur's pockets and, not being called for, were afterwards sold at an auction sale.

"The day before he left for the North defendant ordered the chauffeur to put his Packard runabout and the touring car in good repair during his absence, but did not direct him to consult or employ Rogers. Let it be conceded, however, for present purposes that the chauffeur went to the garage at Thirty-fourth and Broadway to consult Rogers about his master's affairs, and in so doing was acting within the scope of his employment. When that duty was fully performed—and it was so performed when he left Rogers about four o'clock—it became his duty to drive the car to defendant's garage which was straight east only a mile away. Instead of doing this he kept the car in his own service two hours, during which he became intoxicated, and then reappeared with it at the Broadway garage and from near there picked up Rogers and drove north downtown for no other purpose than the gratification of his own pleasure. There is not the slightest pretense in the evidence that from about four o'clock until 6:40 when they arrived at Roger's home, the chauffeur was directly or indirectly in the service of defendant, and, as shown, there is no credible evidence that, on leaving Rogers, he started to take the car to defendant's garage and thereby returned to the performance of a duty he owed defendant.

"All that is shown with any degree of definiteness is that the chauffeur and his companion, still in pursuit of a drunken carouse, returned downtown, secured dissolute companions, procured a supply of intoxicants and headed straight for the country, injuring plaintiff on their way. The chauffeur had no knowledge of the collision with plaintiff, and, therefore, no cause to change his plans. Confessedly he was not in quest of lost keys when he struck plaintiff, and obviously, he had no purpose of returning the car to defendant's garage until after the debauch had burnt itself out. He does not say he was on his way home, but says he has no recollection of what occurred or what he was doing. He never did reach the point of returning to defendant's

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service since, when he wrecked defendant's car by reckless driving, he was still in pursuit of his own pleasure.

"The law applicable to such facts is simple and well settled and is properly stated in our former opinion. The doctrine of liability of the master for the wrongful acts of his servant proceeds from the maxims of '*respondeat superior*' and '*qui facit per alium facit per se*,' and therefore is a doctrine of the law of agency which holds the master responsible for the torts of his servant committed within the actual or apparent scope of his servant's employment.

"It is elementary that the master is not liable for injuries occasioned to a third person by the negligence of his servant while the latter is acting beyond the scope of his employment for his own purposes, although he may be using the vehicle furnished him by the master with which to perform the ordinary duties of his employment. Where the servant, in carrying out the master's orders, merely deviates on some errand of his own from the strict course of duty, but while thus going *extra viam* is really engaged in the execution of some duty of his employment, or where he forsakes duty entirely for a time but returns to its path, the master will be liable for his negligence which injures a third person, under the doctrine of *respondeat superior* (see authorities reviewed in former opinion).

"The facts of the present case lend no support to an inference that the chauffeur either was going *extra viam* while performing a duty of his service, or had returned to such service at the time of his injury. He was clearly and indisputably beyond the actual or apparent scope of his employment and without his master's knowledge or consent had appropriated and was using the latter's car for his own exclusive purposes without any show or pretense of service of the master. In such a case there can be no liability under the rule of *respondeat superior* since no agency of the servant may be implied to do a thing so excessive. [Slater v. Thresher Co., 107 N. W. 133, 97 Minn. 305; Storey v. Ashton, L. R. 4 Q. B. C. 476; Cavanagh v.

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Dinsmore, 12 Hun, 465; Daily v. Maxwell, 152 Mo. App. 415; Lotz v. Hanlon, 217 Pa. St. 339; Patterson v. Kates, 152 Fed. 481; Danforth v. Fisher, 75 N. H. 111; Douglass v. Stephens, 18 Mo. l. c. 368; Garretzen v. Duenckel, 50 Mo. l. c. 107; Walker v. Railway, 121 Mo. 575; Evans v. Auto Co., 121 Mo. App. 266; Vanneman v. Laundry Co., 166 Mo. App. 685.]

"The demurrer to the evidence should have been sustained."

We agree to these views, except the concession made for the argument, that it might be conceded that the servant was in the discharge of his duties when he went to the garage at Thirty-fourth and Broadway at about four p. m. We do not think the chauffeur was then in the discharge of his duties, but this only lengthens the time of his trip of pleasure, and therefore not very material. The judgment *nisi* should be reversed and it is so ordered.

PER CURIAM:—The foregoing opinion of GRAVES, J., in Division is adopted by the Court in Banc as the opinion of the Court in Banc. *Walker, Blair and Williams, JJ.*, concur; *Bond and Faris, JJ.*, concur in result, *Woodson, J.*, dissents in opinion filed.

WOODSON, J. (dissenting)—While I believe the verdict and judgment in this case are unjust, not supported by the greater weight of the evidence, but in fact against it, and ought to be set aside on that account, because I believe the trial court abused its sound judicial discretion in not granting a new trial on that ground, yet I am clearly of the opinion that after the plaintiff has made out his *prima facie* case which is conceded in this case as I understand the majority opinion, the court cannot sustain a demurrer to the plaintiff's evidence, or otherwise take the case from the jury on account of evidence subsequently introduced by the defendant; and for that reason I am of the opinion that my learned associate in so far as he holds that plaintiff's *prima facie* case was completely overcome and destroyed by

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the evidence subsequently introduced by the defendant, and for that reason the demurrer to plaintiff's case should have been sustained, is in error.

In discussing this question, this court, in the case of Peterson v. Chicago & Alton Ry. Co., 265 Mo. 462, l. c. 479, said:

"The second proposition presented is: Was the plaintiff under the facts disclosed by the evidence guilty of such contributory negligence that the court should have declared, as a matter of law, that he could not recover? The question of contributory negligence, as a rule, is a matter of defense which must be pleaded and proven by the defendant.

"As held in paragraph one of this opinion, the plaintiff having made out a prima-facie case, then according to the rule just announced the burden rested upon the defendant to disprove and overcome that case, to the satisfaction of the jury. That, of course, means that the jury and not the court must pass upon the credibility of the witnesses and the weight to be given to their testimony. That is, after a prima-facie case has once been made out, the case can never be taken from the jury. [Boone v. Railroad, 20 Mo. App. 232; Kenney v. Railway, 80 Mo. 573; Gregory v. Chambers, 78 Mo. 298-9; Cannon v. Moore, 17 Mo. App. 102; Gibson v. Zimmerman, 27 Mo. App. 90; Milliken v. Comm. Co., 202 Mo. 637; Rinehart v. Railway, 204 Mo. 276; Vincent v. Means, 184 Mo. 340-341; Bryan v. Wear, 4 Mo. 106; Vaulx v. Campbell, 8 Mo. 224; Wolff v. Campbell, 110 Mo. 114; Randle v. Railway, 65 Mo. 334; McAfee v. Ryan, 11 Mo. 364; Steamboat City of Memphis v. Matthews, 28 Mo. 248; Bradford v. Rudolph, 45 Mo. 426; Wood v. Railway, 181 Mo. 445; Hipsley v. Railway, 88 Mo. 352; Meyers v. Trust Co., 82 Mo. 240; Dalton v. Poplar Bluff, 173 Mo. 47; Mineral Land Co. v. Ross, 135 Mo. 101; Huston v. Tyler, 140 Mo. 252; Gordon v. Burris, 141 Mo. 602; Cornwell v. Wulff, 148 Mo. 542; Seehorn v. Bank, 148 Mo. 265; Weinberg v. Street Ry. Co., 139 Mo. 290; Seawell v. Railroad, 119 Mo. 222; Schroeder

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v. Railroad, 108 Mo. 322; Seligman v. Rogers, 113 Mo. 649.]”

I venture the assertion that the cases cited in support of the rule announced in that case do not constitute one-tenth of the cases in this State announcing the same doctrine; and notwithstanding this well-established rule, the majority opinion in this case brushes it aside and emasculates it with a single breath.

While it is true the doctrine announced in the majority opinion is supported by Berry on Law of Automobiles (2 Ed.), sec. 615, p. 694, yet it appears to me that his reasoning is more plausible than sound.

The rule as stated by the learned author is as follows:

“This presumption cannot stand in the face of *positive proof of facts to the contrary*; and where the plaintiff has relied upon such presumption and it has been *opposed by positive evidence to the contrary*, he must then produce evidence tending to *disprove the defendant's positive testimony* or his *prima-facie* case will fall. The presumption in question is rather a frail thing. It is unlike an inference that arises upon the proof of certain facts, and which is necessarily true if the facts are true. It rests upon the facts that the automobile was owned by the defendant and that the chauffeur who was operating it was in the general employment of the defendant; neither one nor both of which actually tends to prove that the chauffeur was engaged in the owner's business.” (The italics are ours.)

A foreword: In order that I may not be misunderstood I desire to state that I understand the majority opinion to hold that if the positive evidence introduced by either the plaintiff or the defendant shows that the injury complained of was caused by an instrumentality disconnected from any negligence of the defendant, the presumption arising from the proof that the chauffeur was in the general employment of the defendant, and that he was operating the car at the time of the injury, constitutes *prima-facie* evidence that the former was acting within the scope of his employment at the

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time of the injury, is undermined and the *prima-facie* case of the plaintiff falls, and no case is made, and in that situation the plaintiff must fail unless he goes further and shows by specific evidence that the negligence of the defendant caused the injury.

Now, in so far as that rule applies to the plaintiff's evidence, I have no special complaint to make, save that it is rather broadly stated, not excluding certain well known exceptions thereto, but I deny the rule is sound when applied to the evidence of the defendant, as I will now try to show. But before doing so, it seems to me the author attributes undue significance to the words "positive proof," "positive testimony," "specific evidence," etc., for the obvious reason that the jury must pass upon the evidence, whether it is positive, specific, direct or inferential.

Returning to the question in hand: The vice of the rule stated by Mr. Berry is indicated by the italicized words. In substance they declare the law to be that, notwithstanding the fact that plaintiff has made out his *prima-facie* case, yet if the defendant introduces "positive evidence" to the contrary, then the plaintiff cannot recover, without he introduces "evidence (in rebuttal) tending to disprove the defendant's positive testimony." In other words, the rule announces the astounding doctrine in that after the plaintiff has made out a *prima-facie* case, it then becomes the duty of the court, if the defendant introduces evidence tending to show that the injury was caused by some independent agency over which he had no control, thereby disproving the plaintiff's *prima-facie* case, to declare as a matter of law the plaintiff could not recover without he introduces evidence in rebuttal tending to contradict the evidence so introduced by the defendant.

Stripped of all useless and confusing verbiage, that is the true rationale of the rule announced by Mr. Berry and followed in the majority opinion; and I submit, if sound, by the same rule of reason when the plaintiff introduces his evidence in rebuttal contradicting that of the defendant, then the court should instruct the jury to

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find for the former, without the latter should introduce additional evidence tending to disprove that introduced by the plaintiff in rebuttal, and if logically followed to the end, the trial of the cause would thus go on to the end of time, without one of the parties should become weary and quit the fight; and even in that event, the court and not the jury would find the facts. Such is not the law.

As previously stated, the law is that where the plaintiff makes out a prima-facie case against the defendant, although the defendant may introduce evidence which entirely overthrows and disproves the prima-facie case so made, yet the trial court cannot say, as a matter of law, that it is so overthrown and direct a verdict for the defendant. [See cases cited.]

This rests upon the constitutional right to a trial of all such causes by a jury, whose exclusive province it is to pass upon the credibility of the witnesses produced by the defendant, as well as by the plaintiff, and the weight and value to be given to their testimony. Under the rule announced in the majority opinion, the court passes upon the credibility of the witnesses introduced by the defendant and the weight to be given to their testimony; and declares whether or not the prima-facie case has been overcome, while the jury passes upon the credibility of those introduced by the plaintiff and the weight to be given to their testimony. I repeat that is not the law; what is sauce for the goose is sauce for the gander.

Moreover, to make my assault upon Mr. Berry's rule perfectly plain and unanswerable, as it seems to me: Suppose that the only evidence that had been introduced by the plaintiff in this case had been to the effect that Hettenbaugh, the chauffeur, was in the general employment of Holmes, the defendant, to operate the car in question, and that while so operating it he ran the same against the plaintiff and injured him; this, the majority opinion holds, and all concede, would have made out a prima-facie case for the plaintiff, and had the defendant introduced no evidence in defense, the trial

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court, under the authorities before cited, would have been required to have submitted the case to the jury on that evidence alone, and had the jury found for plaintiff, that evidence would have been sufficient to have supported the verdict; this, no one will deny. But the dispute arises over the following supposition I am about to state, namely: Suppose the defendant, instead of having declined to introduce any evidence in the case, as previously supposed, had in fact offered Hettenbaugh, the chauffeur, as a witness, and that he had testified that he was not pursuing his master's orders at the time he struck and injured the plaintiff, but was out on a drunken joy-ride, as suggested by the majority opinion; and suppose further, that as a matter of fact, that evidence of Hettenbaugh was not only not true, but was deliberate perjury, which all must concede might be possible, then how would the case stand? Would that testimony, though absolutely false, be sufficient, as a matter of law, to completely overcome and destroy the plaintiff's *prima-facie* case? I think not; at least, under our rules of practice, which are based upon the constitutional right to a trial by jury, the jury at least should be permitted to find whether or not said testimony was true or false, and the court should not, and is not authorized to declare as a matter of law that perjured testimony in a trial before a jury is sufficient to destroy plaintiff's *prima-facie* case. If this is not true, and the court is clothed with such authority, then perjury might stand at a premium in the jurisprudence of this State, for we have previously shown that if defendant had not introduced any evidence at all, the *prima-facie* case made by him would have been sufficient to have supported the verdict; but under the second supposition mentioned, the perjured testimony would, as a matter of law, have utterly destroyed that case.

To my mind the rule announced by Mr. Berry is predicated upon sophistry and not reason or authority.

I therefore dissent from the majority opinion and am of the opinion that the judgment should be reversed and the cause remanded for another trial for the reasons before stated.

AUGUST HAHN v. MARY LOU HAMMERSTEIN et al., Appellants.

In Banc, November 17, 1917.

1. **WILL CONTEST: Action at Law.** A will contest is a statutory legal action triable by a jury, whose verdict, if supported by substantial evidence on the issues properly submitted, is conclusive on appeal, absent error in the trial and in the giving and refusal of instructions.
2. **ILLEGITIMATE CHILD: Right to Contest Will.** Unless the plaintiff can prove a lawful marriage between testator and his mother, either before or after his birth, and thus establish his heirship and consequent right to attack the will, he must establish, in some other way, a status giving him a financial interest in testator's estate which would be benefitted by a setting aside of the will. No such interest can arise from the fact that he is the natural but illegitimate child of the testator, for in such case he has no heritable right except through his mother.
3. **—: —: Financial Interest: Devisee Under Former Will.** No such financial interest in testator's estate as authorizes him to contest the will is established by a showing that he was the devisee in a former will which was taken by testator after its execution into his own possession and kept until it was destroyed by him prior to the execution of the will in contest.
4. **TESTAMENTARY CAPACITY: Tests.** The tests of testamentary capacity are: first, the testator must understand the ordinary affairs of his life; second, he must know both the nature and extent of his property and the persons who are the natural objects of his bounty; and, third, he must know that he is disposing of his property in the manner and to the persons mentioned in the will. Tested by these rules, the testator, aged eight-eight, had sufficient capacity to make the will in suit.
5. **—: —: Application of Tests: Old Age.** A failure of memory resulting from old age or sickness, forgetfulness of the names of persons testator has known, idle questions, a requiring of the repetition of information, personal eccentricities and oddities, are not evidence of such mental disease and deterioration as render testator incapable of disposing of his property by will.
Held, by GRAVES, C. J., dissenting, that the court should not take single facts and say that each, standing alone, is insufficient to justify the submission of mental incapacity to the jury, but that if the combined circumstances tend to show incompetency, the question should be submitted to them; and that

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the fact that the will was made in April and the testator died in August of softening of the brain, a rather slow but progressive disease, is a strong circumstance tending to show mental incapacity.

6. ——: ——: **Old Age, Fall and Fainting Spells.** The fact that at the age of eighty-five testator made a misstep on the stairway and fell, striking on his head, the fall producing unconsciousness, and that following the fall he was subject to fainting spells, during which he could remember nothing until he got over them, and that his memory grew less distinct as his age advanced, did not deprive him of the power to will his estate, provided after the fall he was still able to attend to his ordinary affairs as usual and otherwise at the time he actually made the will possessed the qualifications of competency as defined in the accepted test rules.
7. ——: ——: **Miserly Conduct.** Miserly conduct in hoarding money, or keeping it on his person or in his room, or piling it up in a safe deposit box, does not legally detract from testator's capacity to make a will.
8. ——: ——: **Mistakes in Money Calculations: Fault of Memory.** The fact that the testator was mistaken as to the amount of money he had on a certain occasion deposited in a bank was a mere fault of memory, and does not tend to prove a lack of testamentary capacity.
9. ——: ——: **Coarse Habits.** Testimony that in his old age testator was occasionally very lightly clad in summer time; that at one time he was seen in a state of nudity; that when reproached about the impropriety of his dress, he replied it was hot; that he was rough, strong in mind and physical constitution, coarse in habits and unrefined in tastes, miserly in disposition and vulgar in behavior, does not tend to establish testamentary incapacity at the time of making the will.
10. ——: ——: **Apoplexy: Soundness on Date of Will: Hypothetical Questions.** The facts that a few months prior to making the will, and again a few months after, testator, eighty-eight years of age, had a fainting spell and a slight attack of apoplexy, and could give to his physician no intelligent statement of the history of his illness or of his condition, were not a sufficient basis for hypothetical questions relating to his testamentary competency propounded to experts, first, because of their intrinsic lack of probative force, and, second, because the undisputed testimony was that on the day the will was written, in pursuance to a prior appointment, he spoke freely and without reserve of his purposes in making the will, dictated its contents and approved and signed its draft, and the circumstances of his condition on that day as established by that testimony were omitted from the hypothetical questions.
11. ——: **Undue Influence.** The facts that the testator, a very old man, whose wife had long been dead, in his will disposing of an

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estate valued at fifty-seven thousand dollars, gave three hundred dollars to a woman who had rendered him many personal services, in consideration that she take care of his burial ground, gave the bulk of his estate to his daughter, and named her son by a former marriage as executor, who the evidence shows was chosen because of his business training and abilities and whom he placed in management of his affairs after the will was made but to whom he gave nothing, do not tend to establish undue influence on the part of any of them.

Appeal from Franklin Circuit Court.—*Hon. R. A. Breuer, Judge.*

REVERSED.

Jesse M. Owen, W. L. Colt, Jesse H. Schaper and Casey & Wright for appellants.

(1) Give to the facts, circumstances and conditions their fullest force, they afford no proof of the fact of marriage between Joseph Ehreiser and plaintiff's mother, nor do they afford the slightest basis from which a marriage might be reasonably and fairly inferred. Mooney v. Mooney, 244 Mo. 372; Conner v. Railroad, 181 Mo. 397; Higgins v. Railroad, 197 Mo. 300. Plaintiff could derive no financial interest in the estate of Joseph Ehreiser from the fact that plaintiff might have been the natural but illegitimate child of Joseph Ehreiser, because both at common law and under the statute no heritable right is given plaintiff except through his mother, Johanna Hahn. R. S. 1909, sec 340; Moore v. Moore, 169 Mo. 432. Respondent wholly failed to make out a prima-facie case on the issue of his legitimacy and the instruction in the nature of a demurrer to the evidence offered by appellants at the close of all the evidence should have been given. Mooney v. Mooney, 244 Mo. 372; Watson v. Richardson, 110 Iowa, 673; Markey v. Markey, 108 Iowa, 373; 17 Cyc. 817. The law presumes that testator destroyed the prior will with the intention of revoking the same before the execution of the will in suit; this presumption stands in the place of positive proof. Hamilton

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v. Crowe, 175 Mo. 634; Willitt's Estate, 46 Atl. 519; Woerner, Law of Administration (2 Ed.), 91, 95; 2 Schuler on Wills, sec. 1084, p. 987. (2) There was no substantial evidence of testamentary incapacity. Holton v. Cochrane, 202 Mo. 410; Roberts v. Bartlett, 190 Mo. 696; Winn v. Grier, 217 Mo. 420; Sayre v. Trustees, 192 Mo. 95; Southworth v. Southworth, 173 Mo. 59; Brinkmann v. Rueggensick, 71 Mo. 553; Sehr v. Lindemann, 153 Mo. 276; Von de Velt v. Judy, 143 Mo. 364; Riley v. Sherwood, 144 Mo. 365; Giboney v. Foster, 230 Mo. 131. There was no evidence to show that Ehreiser had any mental failing whatever. There was not even evidence that he acted "childish" or "funny." The evidence must be substantial. Mere forgetfulness, or peculiarities and eccentricities of character of the testator, are not sufficient. Fulbright v. Perry County, 145 Mo. 443. Imperfect memory, caused by old age or sickness, forgetfulness of names, and idle questions requiring repetition of information, will not establish incompetency. McFadin v. Catron, 120 Mo. 252; McFadin v. Catron, 138 Mo. 197; Riley v. Sherwood, 144 Mo. 354; Sehr v. Lindemann, 153 Mo. 288.

James Booth and John W. Booth for respondent.

(1) Legitimaey of a child is properly proven by the proof of the marriage of its parents and the birth of the child after the marriage. In order to make proof of the facts of marriage of the parents and of the subsequent birth of the child it is not necessary that the evidence of the facts should be made by means of writings or of any official record, or certificate, or by direct and positive testimony; if the evidence be such that if from a consideration of all the facts and circumstances in evidence in the particular case, a jury may reasonably believe that the parents were married, and the child born to them thereafter, the question of legitimacy should when properly in the case be submitted to the jury. In this case the facts were controverted but there was substantial evidence in support of the legitimacy. The jury found for

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respondent, and the court approved their verdict. In all this there was no error. *Mooney v. Mooney*, 244 Mo. 372. (2) Appellants in their brief, by way of argument of the proposition as they state it that respondent is not "a person interested" in the probate of the will in controversy, wander to the proposition that the evidence on the trial showed a state of facts, on which the law presumes a revocation of the will of 1905. This is erroneous, and ignores the evidence of the impaired mind of the testator, and the evidence tending to show the existence of the will up to the time testator's mind became so impaired that he was no longer competent to make a will and tending to show that the defendant, Wm. Hammerstein, obtained it from the testator ostensibly for safe keeping and made way with it. (3) The evidence in this case tending to show opportunities of some of the defendants to have possessed themselves of the will of 1905, testator's statements, as, for example, his statement that he took the same to Hammerstein to keep for him, are admissible in evidence on the issue of revocation, together with other evidences, favorable to the theory that the testator did not revoke it. *Turner v. Anderson*, 236 Mo. 523. (4) Respondent's instruction as to the test of testamentary capacity, is unobjectionable. *Naylor v. McRuer*, 248 Mo. 462; *Andrew v. Linebaugh*, 260 Mo. 623; *Ray v. Westall*, 267 Mo. 130; *Bensberg v. Washington University*, 251 Mo. 659, delusions at 659 to 661. (5) Respondent's instruction is in line with the law concerning undue influence. *Wendling v. Bowden*, 252 Mo. 647; *Naylor v. McRuer*, 248 Mo. 432; *Bensberg v. University*, 251 Mo. 641; *Byrne v. Byrne*, 250 Mo. 632; *Thomas v. Thomas*, 186 S. W. 993; *Grundman v. Wilde*, 255 Mo. 109. (6) The facts alleged in respondent's petition are such that, whether or not he be an heir of Joseph Ehreiser he has a pecuniary interest entitling him under the laws of this State to prosecute this action. *Gruender v. Frank*, 267 Mo. 713; *State ex rel. v. McQuillin*, 246 Mo. 691. (7) Judicial notice will not be taken of the laws of a foreign country. It follows that since respondent was born in the Grand Duchy of Baden prior to the year 1845, of par-

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ents who were inhabitants of the Grand Duchy of Baden, and there is no evidence in this case of what the laws of Baden relating to solemnization and recording evidences of marriage were, the question of the legitimacy of plaintiff was a proper one to be by the court left to be determined by the jury on all the evidence admitted on the trial. *Charlotte v. Chouteau*, 25 Mo. 465.

BOND, J.—I. In April, 1911, Joseph Ehreiser, eighty-eight years of age, executed his last will. On August 28, 1911, the testator died after a ten days' illness of softening of the brain, contributed to by cerebral hemorrhage.

The will and codicil were probated September 8, 1911. In November, 1912, this action to contest the will was brought by August Hahn, who claims to be a son and heir of the testator, and also that under a prior will executed in 1905 he was a devisee of about one-half the estate of the testator, which latter will was revoked by the one executed in 1911.

The grounds of the action are testamentary incapacity and undue influence, alleged to have been exerted by the defendants Louisa Letter, a daughter of the testator, to whom and her children by a former husband, he devised the bulk of his estate, Mrs. Emma Kleissele and William Hammerstein, who was named as executor of the will contested.

It is alleged in the petition that after the making of his former will in 1905, the testator became incompetent to manage his affairs and that his daughter, Louisa Letter, Emma Kleissele and William Hammerstein induced him to put the management of his business affairs in the hands of William Hammerstein, and through undue influence procured the execution of the last will in 1911.

On the first trial of the case the jury failed to agree and on the second trial rendered a verdict for the plaintiff, from which defendants duly appealed.

The evidence shows that the testator Joseph Ehreiser was born March 1, 1823, in Eisenthal, a small

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town in the grand duchy of Baden, Germany; that the plaintiff is the son of one Johanna Hahn and was born on March 1, 1845. There is no record of a ceremonial marriage between Joseph Ehreiser and Johanna Hahn, but there is a record of the date of the birth of the plaintiff and the date of his baptism on March 3, 1845. This record recites that he was the "illegitimate son" of his "unmarried" mother, giving the names of her mother and father and their occupation.

About a year and one-half after the birth of August Hahn, Joseph Ehreiser fled from Germany as the result of a killing on his part growing out of a fight following a dance. He settled in America about 1852, and there married Magdalena Rutschmann, who bore him a daughter named Louisa, now the defendant Louisa Letter. Shortly after the death of his wife Magdalena, he married Eva Beckerly, who lived with him until her death at Pacific, in 1897. No children were born of that marriage.

In 1861, the plaintiff August Hahn came to America and made his home with an uncle, Frank Hahn, at Kansas City, Missouri. Some time after he left Germany his mother Johanna Hahn married one Wurtz. A child Amelia was born of that union, where after the mother, father and child also came to Kansas City.

In 1866 plaintiff, August Hahn, on returning from a trip to St. Louis, stopped at Pacific and called upon Joseph Ehreiser. Plaintiff testified that Joseph Ehreiser told plaintiff he was his son and stated that he had married his mother in Germany and that "she was a good woman." Plaintiff returned to Kansas City where he continued to live and reared a family, engaging in the saloon business. Joseph Ehreiser was called to Kansas City at one time to attend a funeral, on which occasion he visited plaintiff at his saloon, but did not go to plaintiff's home, nor meet any of the members of his family. Plaintiff made several visits to Pacific, Missouri, to see the testator and during such visits was sometimes referred to by the testator as "his boy."

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About a year before the death of the testator he caused the local bank at Pacific to send plaintiff a cashier's check for \$1600.

The testator at the time of his death possessed about fifty-seven thousand dollars, which he had earned by habits of rigid economy as a merchant and as a money lender. He was a stockholder, director and vice-president of one of the local banks at Pacific. Some three years prior to his death he suffered a fall from the stairs leading to the second story of a house which he had rented to Mrs. Thomas, he having reserved two rooms on that floor for his own use, requiring the tenant, Mrs. Thomas, to care for him and furnish his food. As he grew older his suspicions seem to have been very easily aroused and he often declared that some person was trying to steal his papers and that an attempt had been made to chloroform him. He grew careless in his dress and at times wore little, if any, clothing.

On March 25, 1911, the testator sent for William Hammerstein, whom he had known for many years and who had long been an officer in the Bank of Commerce of St. Louis, and informed him that he desired to make a will and wished Mr. Hammerstein to draw it. Mr Hammerstein replied that testator should get a lawyer. The testator declined to do this, and thereupon Hammerstein agreed to draw the will and fixed the fourth day of April as the day when he could come out to Pacific, for the reason that it fell upon a holiday. Before the drawing of the will in pursuance of this request, the following conversation took place between the two :

" 'Mr. Ehreiser, I have heard a great many rumors around town about your having a son, and if I am to draw this will for you I want you to answer one question.' And he says, 'All right,' and I says, 'I want you to answer me that question truthfully' and he says, 'well, what is it?' And I says, 'Mr. Ehreiser, I have heard that you had a son by the name of August Hahn; is August Hahn your son?' He looked at me for a few seconds and says, 'So sure as there is a God in heaven, no,' he says, 'I have not many more years to live, and so

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sure as there is a God in heaven, August Hahn is not my son.' 'Well, I said, 'Now Mr. Ehreiser, I will tell you why I asked you that question. If August Hahn is your son, it is no more than right and proper that you should make some provision for him of a substantial nature, monetary consideration.' 'Yes, yes,' he says, 'I know that, but August Hahn is not my son.' ''

On April 4, 1911, Mr. Hammerstein drew the will in contest, which bequeathed to Emma Kleissele \$300, to August Hahn \$1, and the remainder of his property to his daughter Louisa Letter and her children, William Hammerstein and Louisa Letter being named as co-executors. This will was delivered to William Hammerstein for safe-keeping, and on April 11, 1911, a codicil was executed, the purport of which was to make William Hammerstein sole executor, without bond. This codicil was also given to Mr. Hammerstein for safe-keeping. On April 22, 1911, Joseph Ehreiser executed a general power of attorney to William Hammerstein to transact all business matters for him, which he continued to do up to the time of the death of Ehreiser.

On the same day upon which this suit was brought, plaintiff filed an application in the probate court for the admission to probate of the will of 1905. The court rejected said application.

II. A will contest is a statutory legal action triable by a jury whose verdict, if supported by substantial evidence on the issues properly submitted, is conclusive on appeal in the absence of any intervening error
Legal Action. on the trial or in the giving or refusal of instructions. [Winn v. Grier, 217 Mo. l. c. 430; Sehr v. Lindemann, 153 Mo. l. c. 288; Hayes v. Hayes, 242 Mo. l. c. 168; Roberts v. Bartlett, 190 Mo. l. c. 695, 696.]

One of the vital questions in this case is whether plaintiff is the child of Joseph Ehreiser, born after lawful wedlock between him and Johanna Hahn, the mother of plaintiff. As it is not claimed that any such
Illegitimate Child. marriage took place after the birth of plaintiff (R. S. 1909, sec. 341) the only basis of the legitimacy of plaintiff must rest upon proof

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of a lawful marriage between Joseph Ehreiser and Johanna Hahn in Eisenthal, Germany, before March 1, 1845, the date of plaintiff's birth.

Unless plaintiff can thus establish his heirship and consequent right to attack the will, he must establish, in some other way, a status giving him a financial interest in the estate of the testator which would be benefited by the setting aside of the will. [R. S. 1909, sec. 555; Gruender v. Frank, 267 Mo. 713; State ex rel. v. McQuillin, 246 Mo. 674.] No such interest could arise from the fact that plaintiff might have been the natural but illegitimate child of Joseph Ehreiser, for in such case he would have no heritable right except through his mother Johanna Hahn. [R. S. 1909, sec. 340; Moore v. Moore, 169 Mo. 432.] Neither was such financial interest shown by plaintiff through his claim as the devisee of a prior will, and his application for the probate thereof (which was rejected.) The record in this case shows that said prior will was taken by the testator from his safe-deposit box about one year before he made the present will, and there is not a scintilla of evidence in the record that it ever left the possession of the testator from that time. It was not found among his papers, nor elsewhere after his death, and he stated to the executor, Hammerstein, that he had destroyed it. Plaintiff gave no evidence whatever, contradicting the force of the legal presumption of a revocation arising upon these facts and circumstances. Indeed in his application for the probate of said will, plaintiff admitted that it had been destroyed. In this dearth of contradictory evidence, the legal presumption obtains that the testator destroyed the prior will before making the one now contested. Hence plaintiff can deduce from that will no interest in the property devised in the one under review which would qualify him under the statutes to bring this action. [Hamilton v. Crowe, 175 Mo. l. c. 647, 648; Willitt's Est., 46 Atl. 519; Woerner, Law of Administration (2 Ed.), 91, 95; 2 Schouler, Wills (5 Ed.), sec. 1084, p. 987.]

It follows that the case for plaintiff, as to his financial interest in the setting aside of the present will, depends

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solely upon proof by him of his status as a legitimate son and heir at law of Joseph Ehreiser, and unless the record contains substantial evidence sustaining the claim of plaintiff on that preliminary inquiry, he had no authority to institute this action.

In the event plaintiff's right to sue should be sustainable under the facts in this record, it would still follow that the verdict of the jury setting aside the will would have to be reversed, unless the **Testamentary record discloses some substantial evidence Capacity.** that the testator at the time of the execution of his will had no legal capacity to perform that act, or that his will when made, did not reflect his own wishes in the disposal of his property, but expressed the different designs and objects of other persons having such dominance over his mind as to enable them to influence him to make a will which he would not have done had he been free from such foreign control. [Hayes v. Hayes, 242 Mo. l. c. 169, and cases cited.] In short, that the instrument when made was not his will, but was the will of others.

As these questions of testamentary incapacity and undue influence go to the root of the case in any view which may be taken of the suable capacity of the plaintiff, we will first dispose of them. In that connection it may not be amiss to state the rule of law as to the capacity of a testator to make a valid will under the statutes authorizing such method of transmission of property. [R. S. 1909, secs. 535, 536, 537.] Wills devising lands, both in this country and England, are rights secured by statute or act of Parliament; they had no recognition as such at common law and for about five hundred years there was no English statute providing for the making of wills. [40 Cyc. 996, 997; 4 Kent, 504; Stats. 32, 34, Henry VIII.] Our statutes on the subject have received repeated interpretations and constructions by the courts and certain fixed rules gauging the capacity of the testator to make a will, though variously expressed in some of the cases, have been recognized in all of the decisions as prescribing the follow-

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ing tests of testamentary capacity at the time of the doing of the act: First, the testator must understand the ordinary affairs of his life; second, he must know both the nature and extent of his property and the persons who are the natural objects of his bounty; third, he must know that he is disposing of his property in the manner and to the persons mentioned in his will. The foregoing are the essential elements of testamentary capacity under the statutes and decisions of this State. Different methods of expression are occasionally used, but the rule as above stated is the correct measure of the testamentary capacity of the maker of a will in this State. [Holton v. Cochran, 208 Mo. l. c. 410; Roberts v. Bartlett, 190 Mo. l. c. 696; Winn v. Grier, 217 Mo. 420; Sayre v. Trustees of Princeton University, 192 Mo. 95; Southworth v. Southworth, 173 Mo. 59; Brinkman v. Rueggensick, 71 Mo. 553; Sehr v. Lindemann, 153 Mo. 276; Von De Veld v. Judy, 143 Mo. l. c. 364; Riley v. Sherwood, 144 Mo. l. c. 365; Gibony v. Foster, 230 Mo. l. c. 131.]

In the application of this rule it has long been adjudged that a failure of memory resulting from old age, or sickness, "forgetfulness of the names of persons one has known, idle questions requiring a repetition of information, personal eccentricities and oddities are not evidence of such mental disease and deterioration as render one incapable of disposing of his property by will." [Gibony v. Foster, 230 Mo. l. c. 131; Winn v. Grier, 217 Mo. 420; Southworth v. Southworth, 173 Mo. 59; Bensberg v. Washington University, 251 Mo. l. c. 658.]

There is nothing in any of the testimony offered on behalf of plaintiff which takes the case out of the application of this rule. Although the testator at the time of his decease had attained great age, still it is undisputed (except in the particulars referred to by the evidence adduced for plaintiff to be discussed hereafter) that he was a man of unusual vigor, of body and brain, and that he thoroughly comprehended the affairs of business occurring in the course of his respective callings as lumberman, merchant and lender of

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money, and transacted all of his own business until after the execution of this will. His ability to transact his business affairs personally, with judgment and success, seems to have been beyond question. Some time after making his will he executed a power of attorney (April 22, 1911) at which time he also produced and turned over to his appointee a considerable sum of cash and gave him specific directions to loan it to the Boatman's Bank in St. Louis, for the reason that it paid four per cent on such certificates. Thenceforward he attended to all matters of a strictly personal nature until a few days before his death. It is not claimed by respondent that the testator was at all incompetent to make a will in 1905 (when the prior will was executed). The evidence adduced since that date relating to this point will be now adverted to.

It was shown that about February, 1908, the testator made a misstep on a stairway and fell, striking on his head, producing unconsciousness. He was rubbed by Mrs. Thomas until he recovered himself and received one visit from Dr. Booth and soon thereafter he was able to attend to his ordinary affairs as usual, collecting loans, making interest-bearing deposits and attending a meeting of the board of directors of a local bank, of which he was elected vice-president in March, 1911. These duties he attended to until a few days before his death.

Conceding that following his fall and his increasing years, the testator was, as stated by Mrs. Thomas, subject to fainting spells, during which he could remember nothing until he got over them, and that his memory grew less distinct as his years advanced, such facts would not deprive him of the power to will his estate, provided he still possessed the qualifications of competency as defined above when he actually made his will. Nor was he deprived of that power by evidence showing that it was his custom to keep some money on his person and in the rooms where he lived. The evidence, however, disclosed that when one of his fellow-directors in the bank spoke to him about the risk of such practices, he made an appointment

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and put \$2500 of his private hoard in the form of an interest-bearing loan to the bank and \$740 in his safe-deposit box. It is clear that his conduct in this respect only evidenced a miserly instinct and did not logically or legally detract from his capacity to make a will. Attention is also called to the fact that at one time the testator deposited \$2000 in the bank and insisted afterwards that he was entitled to an additional credit of \$390, in paper money, stating that he recollects taking both sums to the bank and that Mrs. Thomas had counted the money with him. His statement as to the counting of the money previous to taking it to the bank in the presence of Mrs. Thomas, was confirmed by her. It seems the mistake as to this deposit arose from the fact that a part of it was gold coin and the other paper money. The testator thought there were two thousand dollars in gold and \$390 in paper, whereas there were only two thousand dollars of both. The evidence shows that pending the controversy as to this deposit, he deemed the cashier had not accounted for the \$390 of paper money delivered to the bank and spoke of him in harsh terms. Assuming that the testator's recollection was inaccurate in this matter, that fact would not tend to prove a lack of testamentary capacity. Such a mistake might be made by an average business man without creating a suspicion of lack of intelligence. It was at most a mere fault of memory.

The evidence tended to show that in his old age the testator was occasionally very lightly clad in the summer time; that at one time he was seen in a state of nudity; that he was coarse in his conduct and when appealed to about the impropriety of his dress, replied that it was hot.

In February, 1911, testator had a fainting spell—a slight attack of apoplexy. Dr. Booth, who was called in to see him, stated that he could not get a clear statement from the patient as to the history of his illness, nor as to his condition; that the patient would not, or could not tell. The evidence was that after his recovery from this attack he attended to his business as usual until July, 1911, when the doctor was again called in to see him for a faint attack of apoplexy; when observing that he had

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difficulty in walking, the doctor objected to his going up and down steps. The doctor could get no satisfactory explanation as to his condition from the testator, who said he thought somebody had put something in the room and drugged him and that he felt badly thereafter. He did not recover from this illness but died in August, 1911.

These incidents were relied upon by respondent to establish the mental incapacity of the testator, in connection with the answers of two physicians upon the putting to them of a hypothetical question reciting the circumstances supposed by appellant to relate to the competency of the testator. After hearing the question read the two doctors, upon the assumption of the truth of the hypotheses contained in the question, said they would not consider the testator of sound mind on April 4, 1911, when the will was executed. In addition to the lack of probative force intrinsic in the assumptions contained in the hypothetical question, the record shows that it contained no reference to the uncontradicted testimony as to the conduct and behavior of the testator on the day Mr. Hammerstein came, according to previous appointment, to draw his will. The undisputed evidence is that on the occasion in question, a number of persons were present and the testator spoke freely and without reserve of his purposes in making the will, dictated its contents and approved and signed the draft. In the circumstance of the omission of this undisputed testimony bearing on the competency of the testator in the hypothetical question, and the evidentiary impotency of the facts and circumstances recited in the question, we hold the answers of these two physicians should not have been admitted in evidence. [Root v. Railway, 195 Mo. l. c. 377; Fullerton v. Fordyce, 144 Mo. l. c. 531; Russ v. Railway, 112 Mo. l. c. 48; Mammerberg v. Street Ry. Co., 62 Mo. App. l. c. 567.] One of the physicians had attended the testator in the few instances of his illness, and this physician was not asked his judgment or opinion of the sanity of the testator based upon the facts observed by him during social acquaintance; for he, equally with any lay witness, might express an opinion on that subject upon a

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statement of facts showing the basis of such opinion. [Farrell's Admr. v. Brennan's Admx., 32 Mo. l. c. 334; State v. Erb, 74 Mo. l. c. 205; State v. Speyer, 194 Mo. l. c. 468; State v. Klinger, 46 Mo. l. c. 229; Cram v. Cram, 33 Vt. 15; 17 Cyc, 139, and cases cited.] Indeed, respondent did not call any witness to prove permanent insanity on the part of the testator at any time, or adduce any testimony that he was temporarily insane on April 4, 1911. As to the occurrences on that date, the testimony for the proponents of the will is clear and positive to the effect that the testator possessed full knowledge of his affairs, gave specific directions for the execution of his will, was able to attend to his business, knew who were the natural objects of his bounty and designated the persons named in his will to enjoy the devises therein and point-blank refused to make any bequest to Mrs. Thomas, for the reason that he had paid her fully for all of her services. The full tendency of the proof adduced on behalf of respondent was to show only that impairment of memory and decline of mental vigor which often accompanies, under biological laws, the impairment of bodily strength in very old persons and which experience teaches may coexist with the retention by the subject of full intelligence and the substantial use of his mental faculties. Neither singly nor in conjunction did the circumstances adduced by respondent tend to show any lack of the essential requisites required to make a valid will under the settled law of this State. The testator was a rough man, of strong mind and physical constitution, coarse in his habits and unrefined in his tastes, miserly in his disposition and vulgar in his behavior; but the evidence totally fails to show any basis for a reasonable inference that he was, on April 4, 1911, lacking in that degree of competency prescribed by law for the making of a will.

We must hold, therefore, that the learned trial judge erred in submitting to the jury the issue of the competency or testamentary incapacity of the testator to make the will in question.

III. Neither is there any evidence in this record which justified the submission of the issue of undue influence

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under the established principles of law defining the meaning of that phrase. [Andrew v. Linebaugh, 260 Mo. l. c. 661; Fullerton v. Fordyce, 144 Mo. 519; Maddox v. Maddox, 114 Mo. l. c. 48.] It is charged that this dominance over the mind of the testator was the result of the joint efforts of his daughter, Mrs. Letter, the executor of the will, Mr. Hammerstein and Mrs. Kleissele. Mrs. Kleissele, who, the evidence shows, had rendered many personal services to the testator during a long acquaintance, was given \$300 in consideration of taking care of his burial ground. Mrs. Letter, the daughter of the testator, was given the bulk of his estate. The executor was given nothing, but was selected to take the trust, as the evidence tends to show, on account of his training, experience and ability as a business man. There is not a fact in the record which tends to show any concerted action on the part of any of these three persons to induce the testator to make any of the bequests contained in the will. The only suggestion made to him by the executor, as has been shown, was that if the respondent was the natural child of the testator, he ought to make some provision for him. This the uncontradicted evidence shows the testator declined to do in his will, though the record shows that about a year before the making of the will the testator sent a sum of money to the respondent. We do not see the slightest evidence in this record reflecting on any one of the persons charged with unduly influencing the testator in the disposition of his estate. The facts shows that Mr. Hammerstein did not manage the testator's business affairs prior to the making of the will nor subsequently, until Mr. Ehreiser sent for him and handed him two thousand dollars to deposit in the bank and appointed him his attorney in fact to attend to his business matters. None of the persons charged occupied any fiduciary relation to the testator before the making of the will.

Having reached the conclusion that the record does not show any substantial evidence, either that the testator was mentally incapable of making his will at the

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time and date of its execution, or that his mind was then subject to the influence of the defendants so that the will in question reflected their wishes and not his own volition, we are constrained to hold that the judgment in this case must be reversed. It is so ordered.

PER CURIAM:—The foregoing opinion of BOND, J., in Division No. One is adopted as the opinion of the Court in Banc. *Walker, Faris, and Woodson, JJ.*, concur; *Graves, C. J.*, dissents in separate opinion; *Blair and Williams, JJ.*, dissent.

GRAVES, C. J. (dissenting)—I think there is sufficient evidence in this case to justify the submission of the case to the jury upon the question of mental incapacity. This court has long since departed from the theory of taking single acts, and saying that each, when standing alone, is not sufficient to justify the submission of the question of mental incapacity. If these combined circumstances tend to show mental incapacity, it is a question for the jury.

The whole question has been so recently and fully gone over by LAMM, C. J., in *Turner v. Anderson*, 260 Mo. l. c. 16, that we will not reiterate. Under the facts in this record the present opinion is in full accordance with the dissenting opinion in *Turner v. Anderson*, but not in accord with the majority views in that case. The very fact that the will was made in April and the testator died in August of softening of the brain, a rather slow, but progressive disease, is a strong circumstance tending to show mental incapacity. This with other recited facts justify the submission of that question. We should not take a step backward, and depart from the rulings in *Turner v. Anderson*, *supra*; *Wendling v. Bowden*, 252 Mo. l. c. 692; *Teckenbrock v. McLaughlin*, 209 Mo. l. c. 538, and *Mowry and Kettering v. Norman*, 204 Mo. l. c. 193.

I therefore dissent to the ruling in the majority opinion on this question, and from the result.

CHARLES H. HOLMAN v. PATRICK H. CLARK et al;
CITY OF ST. LOUIS, Appellant.

In Banc, November 17, 1917.

1. **INDEPENDENT CAUSES: Explosion of Dynamite: Substantial Evidence: Question for Jury.** The rule that when the evidence discloses two independent causes of the injury, for one of which defendant is liable and for the other of which he is not, it is incumbent upon the plaintiff to show that the cause for which defendant is liable produced the injury, imposes upon the plaintiff the duty of offering substantial evidence tending to show that the cause for which defendant is liable produced the injury; and that having been done, the jury, under proper instructions, passes upon the question of fact thus involved, just as upon any other such question, and the quantum of evidence necessary to sustain a finding thereon differs not at all from that required on other issues of fact. The appellate court cannot weight conflicting evidence upon such an issue.
2. **EXPLOSION OF DYNAMITE: Independent Contractor: Liability of City.** The use of explosives by an independent contractor in the construction of a sewer, of such character as to necessitate blasting, must be foreseen by the city; but such use is lawful, and having in readiness, near the work, dynamite in proper quantities for use in blasting, is neither necessarily nor so palpably dangerous, when managed in the ordinary way, as to constitute a thing inherently dangerous; and if the explosive so held in readiness becomes, in the circumstances of a particular case, a nuisance by reason of the independent contractor's negligence of method, without more, provided he is not incompetent, he alone, and not the city, is liable for injuries resulting from explosions.
3. **—: Negligence in Storing: Proof of Particular Causal Acts.** In determining, after an explosion, whether or not the independent contractor, engaged in constructing a sewer necessitating blasting, had created a nuisance in the street, the locality, the quantity and manner of keeping must be considered, as well as the nature of the explosive and its liability to accidental explosion; and in deciding whether or not a public nuisance existed in connection with the storage of the material which exploded, the question of the manner in which it was kept may enter into consideration; but when it is once determined upon sufficient evidence that such nuisance was maintained, then no particular causal act directly contributing to the explosion need be shown.

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4. _____: **Nuisance on Private Property: Liability of City.** A city is not ordinarily liable for failure to abate a nuisance upon property of a private owner, no injury to the users of the street being threatened, since that is but a failure to exercise a governmental power.
5. _____: **Nuisance in Street: Maintained by Contractor: Liability of City.** The fact that the independent contractor was engaged in work for the city has nothing to do with the question of whether the city is liable to an owner of property, adjacent to a street, for damages to said property resulting from a nuisance created by said contractor in the street.
6. _____: _____: _____: _____: **Notice.** In the absence of notice to the city and of facts from which notice can reasonably be inferred, that the contractor, engaged in the construction of a sewer requiring blasting, had taken into the shed erected in the street, in which were a gasoline engine supplied with fuel and used in drilling rock and a large tank containing a reserve supply of gasoline and placed a few feet from the engine, some sticks of dynamite, taken from the usual place of storage near by, which did not explode, the city is not liable in damages for injury to private property abutting on the street, resulting from an explosion in the shed, in which there was no habitual storage of dynamite.

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm, Judge.*

REVERSED.

*Charles H. Daves and H. A. Hamilton for appellant;
Holland, Rutledge & Lashly, A. E. L. Gardner and John T. Fitzsimmons, of counsel.*

(1) In many jurisdictions it is ruled that a contract for blasting is like any other contract; that the defense of independent contractor is a complete defense, and that one making a contract for blasting is not liable for the negligence of the contractor, even in the actual operation of the blast itself. *Blum v. Kansas City*, 84 Mo. 112; *Frensch v. Vicks*, 143 N. Y. 90; *Herrington v. Lansburgh*, 110 N. Y. 145, 6 Am. St. 348; *Pack v. Mayor*, 8 N. Y. 222; *Kelly v. Mayor*, 11 N. Y. 432; *McCafferty v. Rail-way*, 61 N. Y. 178, 19 Am. St. 267; *Hill v. Schneider*, 13 N. Y. App. Div. 299; *Wiener v. Hammell*, 14 N. Y. Supp.

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365; Edmonson v. Railroad, 111 Pa. St. 316; Tibbitts v. Railroad, 62 Me. 437; Berg v. Parsons, 156 N. Y. 109, 41 L. R. A. 391. (2) Those cases which hold that one making a contract for the doing of blasting is to be held liable for the consequences to third parties upon the ground that he has contracted for the doing of a thing inherently dangerous, have carefully limited the doctrine to injuries which result from the actual operation of blasting, and have at great pains distinguished such injuries from injuries resulting from purely collateral acts, such as the negligent handling of dynamite by the contractor not incident to the operation of blasting itself. For negligence of the contractor in matters purely collateral to the contract the employer is not liable. The principle is that applicable to all contracts for the doing of work which threatens injury. The employer is responsible only for the work which he has contracted shall be done, and not for negligence of the contractor in matters collateral thereto. Water Co. v. Waer, 16 Wall. 556; 12 Am. & Eng. Ency. Law (2 Ed.), 512; Brannock v. Elmore, 114 Mo. 55; Salmon v. Kansas City, 241 Mo. 14; 16 Am. & Eng. Ency. Law (2 Ed.), 201; Loth v. Theater Co., 197 Mo. 354; Horner v. Nicholson, 56 Mo. 221; Dillon on Mun. Corps., sec. 1723; 19 Cyc. 9; Carmon v. Ry. Co., 4 Ohio St. 399; St. Paul v. Seitz, 3 Minn. 297; Chicago v. Murdock, 212 Ill. 9; Railroad v. Yonley, 43 Ark. 508; Lancaster v. Ins. Co., 92 Mo. 460; Ardesco Oil Co. v. Gleason, 63 Pa. St. 146; Robbins v. Chicago, 71 U. S. 657; Joliet v. Harwood, 20 Am. St. 17, 86 Ill. 110; Railroad v. Tow, 66 L. R. A. 941, and note. All of the above cases show that blasting operations are legal and are recognized as such by the law. (3) The evidence in this case showed that dynamite is not of such a character as to threaten injury where small quantities are in possession of a contractor and are delivered to him from day to day as the work progresses. (4) Plaintiff failed to show whether the explosion was an explosion of dynamite or an explosion of gasoline vapor. If there are two causes which might have produced an injury, the burden is upon the plaintiff to show that the damage actually resulted from the cause alleged.

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Fuchs v. St. Louis, 167 Mo. 635; Epperson v. Postal Tel. Co., 153 Mo. 346; Warner v. Railroad, 178 Mo. 125; Breen v. Cooperage Co., 50 Mo. App. 202; Searles v. Railroad, 101 N. Y. 661; Dobbins v. Brown, 119 N. Y. 188. (5) There was an improper joinder of causes of action. The code does not contemplate that one may have numerous tort claims assigned to him without consideration and then bring suit upon them in one petition.

James R. Van Slyke for respondent.

(1) One who uses or stores dynamite on his property is liable to his neighbor for injury or damage caused by its explosion, whether he is careful or not in the use and keep of same. Scalpino v. Smith, 154 Mo. App. 524; Blackford v. Cons. Co., 132 Mo. App. 162; Faust v. Pope, 132 Mo. App. 287; Carson v. Cons. Co., 189 Mo. App. 120; Hoffman v. Walsh, 117 Mo. App. 287; Knight v. Donnelly, 131 Mo. App. 162; Salmon v. Kansas City, 241 Mo. 14. (2) The city is under obligation to keep its streets safe. Salmon v. Kansas City, 241 Mo. 14. (3) The city is under the same liability and responsibility for the work it causes to be done as a private owner. Salmon v. Kansas City, 241 Mo. 53. (4) When work is caused to be done which is inherently dangerous and attended with danger to others either in methods necessarily employed or agencies necessarily used the principal is liable even if independent contractor is employed. Salmon v. Kansas City, 241 Mo. 47; Loth v. Theatre Co., 197 Mo. 351; Dillon v. Hunt, 105 Mo. 154; Carson v. Cons. Co., 189 Mo. App. 120; Wiggins v. St. Louis, 135 Mo. 558; Crenshaw v. Ulman, 113 Mo. 640; Eberson v. Continental, 118 Mo. App. 67; Gas Co. v. Norwalk, 63 Conn. 527; Chicago v. Murdock, 212 Ill. 9; St. Ry. Co. v. Smith, 146 Ala. 316; Logansport v. Dick, 70 Ind. 65; Mullins v. Siegel-Cooper Co., 183 N. Y. 129; Haracker v. Idle Dist. Council, 1 L. R. Q. B. 335. (5) The nature and power of dynamite has been demonstrated by universal experience and it is a matter of common knowledge that its use or presence is inherently dangerous and of this the courts will take judicial notice. Carson v. Cons. Co., 189 Mo. App. 120; Fitzsimmon v. Braun, 199 Ill. 394; Salmon

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v. Kansas City, 241 Mo. 67; Scalpino v. Smith, 154 Mo. App. 523; 16 Cyc. Law & Proc. 855; 17 Am. & Eng. Ency. Law, 909. (6) Judicial notice justifies finding even against evidence. 16 Am. & Eng. Ency. Law, 852. (7) Plaintiff's petition alleges contractor kept stored and used dynamite in city street, which exploded, causing damage to plaintiff and his assignors. This states a cause of action alone, aside from other allegations, against contractor. (8) Plaintiff's evidence conclusively shows presence of dynamite at place of explosion immediately before occurrence, an explosion, and that dynamite has disappeared. The court finds the fact to be that dynamite exploded. This finding is conclusive. (9) If causes of action were improperly joined in separate counts defendant waived this defect by filing its answer. Barrie v. U. R. Co., 138 Mo. App. 640; Jaurdan v. Transit Co., 202 Mo. 418. (10) The assignment being in writing and made before institution of suit, the causes of action being assignable, plaintiff can prosecute action for himself and assignors. Guerney v. Moore, 131 Mo. 650; Dean v. Chandler, 44 Mo. App. 341; Gay v. Orcutt, 169 Mo. 406; Roth v. Wire Co., 94 Mo. App. 261; Peters v. Ry. Co., 24 Mo. 588; Snyder v. Ry. Co., 86 Mo. 613; Doering v. Kenamore, 86 Mo. 588; Chouteau v. Baughton, 100 Mo. 406.

BLAIR, J.—The city of St. Louis appeals from an adverse judgment in an action instituted against it and others to recover damages for injuries to certain residences from an explosion of dynamite in the possession of a contractor who was constructing a sewer. Judgment went against the contractor, also, but it did not appeal. The finding for respondent was upon twelve counts, the first of which is typical of the rest and alleged, substantially: that respondent owned certain realty and the buildings thereon, in St. Louis City; that certain defendants had contracted with the city to build a sewer; that the city, prior to letting the contract, had tested the ground along the line of the proposed sewer in order to ascertain the nature thereof and thereby discovered that in the process of construction it would

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be necessary to remove large quantities of rock by blasting near respondent's property; that the city knew or, had it exercised ordinary care, could have known, that the use of high explosives would be necessary in order to remove the rock under the terms of the contract; that the contractor would bring and store in or near the street in which the work was to be done quantities of high and dangerous explosives; and knew that portion of the city along the line of the proposed sewer was thickly settled and that the storing and using of said explosives necessary for the performance of the work under the contract would be "inherently dangerous" to persons and property in the vicinity of the proposed sewer; and that the city, during the progress of the work, knew, or by the exercise of ordinary care could have known, that the contractor was storing and using large quantities of dynamite, a high and dangerous explosive, in and near the city streets for the purpose of blasting rock in order to remove it, under the contract; that the contractor and other defendants, in the performance of the work, on November 18, 1910, and for a long time prior thereto, "used, kept and maintained in the said city of St. Louis, near and upon a public street of said city of St. Louis, known as Canterbury Avenue, and in the immediate vicinity of the property of plaintiff herein, high and dangerous explosives which were a menace and threatened danger to the persons and property in said vicinity, and that the keeping and maintaining of said high explosives in said city in said city street was an inherent danger and attended with danger to the persons and property in said vicinity, all of which facts plaintiffs state were known to the city of St. Louis, or could have been known by the exercise of ordinary care;" that at the time it let the contract the city knew or by the exercise of reasonable care could have known that the contractor was inexperienced, unskilled, irresponsible and incompetent to perform the contract work, and also knew or in the exercise of ordinary care could have known that the contractor was conducting the work in a danger-

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ous manner, i. e., allowing quantities of dynamite to be collected and remain in a public street without any guard or watchman; and knew the contractor and other defendants had purchased dynamite, etc., for use in the sewer work, without making any affidavit as to the purpose for which it was to be used, in violation of the statute; that an ordinance of the city (pledged) prohibited the keeping or storing of dynamite in the city in quantities greater than thirty pounds and the keeping of more than twenty-five pounds more than thirty minutes in a city street, and that the contractor, with the city's knowledge, violated this ordinance; that the defendants other than the city on November 18, 1910, and for a long time prior thereto kept and stored in or near Canterbury Avenue, near respondent's property, high and dangerous explosives, which it was their duty to use a high degree of care to guard and safely keep and prevent danger by reason of the explosion thereof; that "so keeping dynamite and causing work to be done requiring the keeping of said dynamite in and near the city streets was an inherent danger and threatened danger to persons and property in said vicinity and more particularly to the property of plaintiff herein, and that on said date, said high and dangerous explosives did explode and as a result . . . plaintiff's property was damaged," etc.

The other counts were based upon injuries from the same explosion to the properties of other persons who had assigned their causes of action to respondent Holman.

The city's answer consisted of (1) a general denial; (2) a plea of misjoinder; (3) a plea that contractor was an independent contractor; (4) a specific denial that the sewer contract required the bringing and storing in the street or elsewhere, near the property of respondent or his assignors, "any large quantity of dynamite;" and (5) that the "explosion, if any, . . . did not occur in and was not incident to the performance of anything required to be done by the contract of this defendant with its said contractors, but oc-

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curred in a matter entirely collateral to the performance of said contract."

The briefs proceed upon the theory that the relation between the city and the corporation constructing the sewer was that of contractee and independent contractor. Respondent does not contend the relation was any other, and our attention has been called to nothing in the contract which discloses anything warranting a different conclusion.

The evidence tends to show the plans disclosed it would be necessary, in the construction of the sewer, to remove large quantities of rock, and tends to show that, in the circumstances, the only practical method of removing such rock involved blasting operations, and that dynamite was customarily employed for such purpose, being the safest explosive available therefor. It further tends to show the contractor had installed in a shed erected in Canterbury Avenue, near appellant's residence, a gasoline engine, equipped to operate an air-compressor, a device employed in drilling into the rock in preparation for blasting; that a small gasoline tank was connected with the engine and directly supplied it with fuel, while a larger tank, containing a reserve supply of gasoline, was placed a few feet from the engine; that dynamite, in a box or boxes, once or twice previously had been seen in the same shed. There was also evidence that one of appellant's policemen two days before the explosion had observed a box marked "dynamite" just outside of the shed; and that boxes similarly labeled had once before the explosion been seen in the shed, and at least one box containing dynamite was seen in the shed about an hour before the explosion; that just before nine o'clock A. M., November 18, 1910, the shed mentioned was observed to be on fire and soon thereafter there was an explosion which demolished the shed, destroyed the large gasoline tank, broke the muffler of the engine, created a hole in the ground about two feet deep and four or five feet across, broke an iron pipe and injured dwellings for several blocks

around, shattering glass five or six blocks away. There was evidence strongly tending to explain or contradict that upon which the above statement is based, but the finding for respondent is taken as settling the conflict. Other facts may be detailed in the course of the opinion.

I. Appellant contends respondent failed to show whether the explosion was one of dynamite or gasoline

Independent Causes. vapor, and invokes the rule that when the evidence discloses two independent causes of injury, for one of which a defendant is

liable and for one of which he is not, it is incumbent upon the plaintiff to show that the cause for which the defendant is liable produced the result. Typical cases cited are *Warner v. Railroad*, 178 Mo. l. c. 134, and *Fuchs v. St. Louis*, 167 Mo. l. c. 635.

(a) That rule imposes upon a plaintiff, so far as any question of law is concerned, the duty of offering substantial evidence tending to show that the cause for which defendant is liable produced the injury. The trier of the facts, under proper instructions, passes upon the question of fact involved just as upon any other such question, and the quantum of evidence necessary to sustain a finding thereon differs not at all from that required on other issues of fact. We can no more weigh conflicting evidence on such an issue than on any other.

(b) Even if appellant's apparent view, that this court will weigh the evidence on this issue, were correct, we have no hesitancy in saying that the record discloses the evidence preponderates in favor of the conclusion that there was an explosion of dynamite.

II. The sewer was being constructed by an independent contractor. The evidence justified a finding (which we must assume was made) that the character of the work contracted for necessitated blasting. The

Liability for Explosion. damages sued for did not result from firing blasts and no question respecting the city's obligation to require proper

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precautions, in that particular process, is involved. Explosion of dynamite in the street gave raise to this case. Blasting being necessary, the use of explosives must have been foreseen by the city, but such use is lawful; and having in readiness, near the work, dynamite in proper quantities for use in blasting is neither necessarily nor so palpably dangerous, when managed in the ordinary way, as to constitute a thing inherently dangerous. If, therefore, the explosive so held in readiness becomes, in the circumstances of a particular case, a nuisance by reason of the contractor's negligence of method, without more, provided the contractor is not incompetent, he alone is liable. [Cuff v. Railroad, 35 N. J. L. l. c. 22.]

III. Is the city liable for failure to put an end to the use of the street in the manner which resulted in the damages sued for?

(a) The trial court was justified in finding, and we assume it did find that at the time of the explosion there were fifty or a hundred pounds of dynamite in the shed;

**Explosion
of Dynamite
in Shed:
Negligence
in Storing.** that the neighborhood was populous, and that in the shed, constructed of pine boards, was a gasoline engine equipped with a gasoline supply tank beneath it, and that in the same shed there was a large separate gasoline tank which was partially empty—which condition usually results in the formation of an explosive mixture of air and gasoline vapor; that attached to the engine was a muffler which might “back fire” with some violence; that at the time of the explosion several sticks of dynamite had been left near the muffler, probably for the purpose of thawing them, the weather being cold.

These facts, if found, taken most strongly against appellant, warranted the conclusion that the contractor had created a nuisance in the street. “In determining the question [whether or not a nuisance] the locality, the quantity and manner of keeping will all be considered, as well also as the nature of the explosive and its liability to accidental explosion.” [1 Wood on Nuisances, sec. 140.] In some cases, negligence of a character to make

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that a nuisance which otherwise would be lawful may appear in the attending circumstances; therefore, after an explosion, when deciding whether or not a public nuisance existed in connection with the storage of the material which exploded, the question of the manner in which it was kept—whether negligently or otherwise—may enter into the consideration; but when it is once determined upon sufficient evidence that such a nuisance was maintained, then no particular causal act of negligence directly contributing to the explosion need be shown; it is sufficient to prove facts which justify the finding of a public nuisance, and when the explosion is a thing that could naturally flow therefrom, then, since that possibility is one of the very elements which go to make up the nuisance, in the absence of testimony to the contrary, the explosion will be assumed to have followed as a result thereof. If the “place and manner of keeping the quantity and kind of dynamite here involved, considering its liability to explode (according to the facts in that particular as the jury may find them), created a danger beyond that which *ex necessitate* always attaches to the lawful possession of such a material, and that this danger amounted to a menace to life and property in the neighborhood, then they properly could determine that the defendants had maintained a public nuisance which resulted in the destruction of plaintiff’s building, and bring in their verdict accordingly, even though no particular act of negligence directly responsible for the explosion were shown.” [Forster v. Rogers Bros., 247 Pa. l. c. 59, 60.]

Waiving for the moment the question whether there was any evidence of such “storing” and “keeping” of dynamite in the shed, we shall assume a finding bringing the case within the rule quoted.

(b) The rule that a city is liable to persons lawfully using the streets for injuries resulting from nuisances which, with notice, it suffers to continue therein, even

though created by its independent contractor, is not applicable to the facts of this case, since the damages sued for were not inflicted upon any one using the street as

—: Nuisance
on Private
Property.

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a way. A city ordinarily is not liable for failure to abate a nuisance upon property of a private owner, no injury to users of the street being threatened, since that is but a failure to exert a governmental power. On the other hand, a city ordinarily is liable for damages from a nuisance created and maintained by it upon property owned and controlled by it in its private capacity.

(c) The question in this case is whether the city is liable to an owner of property, adjacent to a street, for damages resulting from a nuisance created by another in

_____ : In the street. The fact that the person creating work for the nuisance in this case was a contractor en-

gaged in work for the city has nothing to do with the actual question to be decided. Is the character of the city's control over its streets such that it owes to owners of adjacent property a duty to abate nuisances in the streets like that an individual owes with respect to the abatement of such nuisances on his own land? Or is its obligation one due only to users of the street, and is its duty to adjacent owners comparable only to its duty with respect to nuisances upon private property and of such character, with respect to adjacent owners, as to call merely for an exercise of governmental power, a failure to exert which imposes no liability? The decisions almost invariably have to do with injuries to users of the street. With respect to them, the city for injuries resulting from its sufferance, with notice, of a nuisance in the streets, is liable because of its duty to keep its streets in reasonably safe condition for use by persons who, in the exercise of ordinary care, travel upon them. It is obvious this rule is not broad enough to solve the question in this case. No decision has been called to our attention which has sustained a recovery on facts like those in this case.

In *Smyth v. New York*, 203 N. Y. l. c. 111, the city was held not liable for damages resulting from the explosion of an excessive amount of dynamite *kept* by contractors in a city street, without proper precautions being taken to prevent an explosion. It was held the street, in

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that case, was not under the city's control, having been withdrawn therefrom, and also held that the city had no notice of the storing of an excessive amount of explosives. In this case the city had the usual control of the street except in so far as it was in actual use and occupation by the contractor in prosecuting the contract work. In this case there was no substantial evidence that there was any habitual storing of dynamite in the shed. Sufficient notice to the city cannot be implied from the mere fact that dynamite was seen in the shed about fifteen minutes, perhaps an hour, before the explosion occurred. The contractor had, distant from the shed, a place prepared for keeping dynamite in quantities appropriate and adequate to meet its need of the explosive as the blasting progressed. This quantity was replenished about every other day. No injury resulted from this. Notice of this fell far short of notice there was dynamite in the shed. Two days before the explosion a police officer saw a box marked "dynamite" *outside* the shed and saw a workman, at another time, take a few sticks of it into the shed and bring a few sticks out of it. Whether the box the officer saw contained dynamite, or anything at all, he did not pretend to know. The evidence shows no habitual keeping of dynamite in the shed and, except as to the morning of the explosion, does not show at all satisfactorily that there was dynamite there. The knowledge of a police officer that a box whose contents are unproved, two days before the explosion, stood for a little time *outside* the shed, and that at another time a workman carried a few sticks of the explosive into the shed and carried a few sticks out of it does not, in our opinion, justify an imputation to the city of knowledge that dynamite in dangerous quantities was habitually stored *inside* the shed. Lacking notice, the city cannot be held in this case on the ground that it suffered the maintenance of a nuisance in the streets. The question whether the evidence tends to show a nuisance was maintained need not be further considered. The judgment is reversed.

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PER CURIAM:—The foregoing opinion is adopted as the opinion of the Court in *Banc. Graves, C. J., Walker, Faris and Williams, JJ., concur; Bond and Woodson, JJ., dissent.*

ROBERT A. CREASON v. DAZARENE YARDLEY
and Unknown Heirs of OLIVER MYERS; DAZ-
ARENE YARDLEY, Appellant.

In Banc, November 17, 1917.

1. **PROCESS: In Name of the State.** The provision of the Constitution requiring that "all writs and process shall run in the name of the State of Missouri" is directory and not mandatory in its nature.
2. _____: _____: **Order of Publication.** An order of publication which conveys the same information that it would impart if running in the name of the State is neither void nor voidable, although it is not made to run in the name of the State; and being neither void nor voidable, but a substantial compliance with the law, it cannot upon motion be quashed because it does not so run. [Overruling *Obiter dicta* in *Doan v. Boley*, 38 Mo. l. c. 450.]
3. **MERITS OF ACTION: Disregard of Technical Errors.** Where the court has jurisdiction of the subject-matter and by a substantial compliance with the law has obtained jurisdiction of the persons of defendant, it should disregard a failure of the writ or process to technically comply with constitutional provisions or statutes that are purely directory, if such process imparts to defendant the same information as would a technical compliance therewith.

Appeal from Sullivan Circuit Court.—*Hon. Fred Lamb,*
Judge.

AFFIRMED.

D. M. Wilson for appellant.

(1) All writs and process shall run in the name of the State of Missouri. Sec. 38, art. 6, Mo. Constitution. (2) Although this requirement of the Constitution is directory, and its omission only an irregularity, yet it can be taken advantage of (as was done in this case) by motion to quash. *Doan v. Boley*, 38 Mo. 449. (3) Error apparent on the face of the record, which includes the pleadings, summons (order of publication) and judgment,

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may be taken advantage of in the Supreme Court whether any motion was made or exceptions taken in the court below or not. Bateson v. Clark, 37 Mo. 31. (4) The order of publication shall be directed to the non-residents. Sec. 1770, R. S. 1909. (5) Jurisdiction of the person can only be acquired by a strict compliance with the requirements of the statute, and if the statutory provisions authorizing service by publication are not complied with the judgment against the appellant is void. Parker v. Burton, 172 Mo. 91; Kelly v. Murdagh, 184 Mo. 377. (6) An order of publication must be in strict compliance with the statute. Schell v. Leland, 45 Mo. 289; State ex rel. v. Field, 107 Mo. 451; Harness v. Cravens, 126 Mo. 246-253; Lumber Co. v. Keener, 217 Mo. 529; Stanton v. Thompson, 234 Mo. 7. (7) Although the record of a court of general jurisdiction recites that the defendant has been duly served with process, it is competent to overthrow such recital by showing by other parts of the record that such recital is not true. Williams v. Monroe, 125 Mo. 584. (8) The order of publication shall state briefly the object and general nature of the petition. Sec. 1770, R. S. 1909. And the true meaning of the statute is that it shall go to the extent of a substantial statement of all the objects of the suit. Bobb v. Woodward, 42 Mo. 489.

E. B. Fields for respondent.

(1) The provision requiring process to run in the name of the State of Missouri is directory merely. State v. Foster, 61 Mo. 449; Cape Girardeau v. Riley, 52 Mo. 424; Davis v. Wood, 7 Mo. 162; Bick v. Wilkerson, 62 Mo. App. 31. (2) The order of publication is sufficient in substance. It advises the defendant of the commencement of the suit and its object and general nature (that it is to ascertain and determine the interests of the respective parties to the lands described in the petition and order of publication). This is all that is required. Sec. 1770, R. S. 1899; Jasper County v. Wadlow, 82 Mo. 172; Hambel v. Lowry, 264 Mo. 168. (3) This publication is sufficient in substance and form and is a copy almost ver-

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batim of the order in the case of *Miller v. Keaton*, 260 Mo. 708, set out in full on page 714. *Hambel v. Lowry*, 264 Mo. 168. This is the form that has been published in every revision of the statutes since 1855: Form 86, vol. 2, R. S. 1855; Form 86, G. S. 1865, p. 993; Form No. 86, vol. 2, Wagner's Statutes, p. 1411; Form No. 86, R. S. 1879, p. 716; Form 91, R. S. 1889, p. 2248; Form 87, vol. 1, R. S. 1899; Form 129, R. S. 1909, p. 3760. Thus it had the legislative sanction for more than fifty years, in which no other form was ever given and it is doubtful if any other form was ever used in the general practice of this State and it has met with frequent approval of the appellate courts of this State. Authorities supra. (4) The defendants had notice as the appellant appeared and made the motions referred to in the record. There is no pretense that her rights were in any way prejudiced or that she was deprived of any opportunity to make her defense, and merely commencing the order with the words, "The State of Missouri to Dazarene Yardley," would not have helped her cause in the least. The objection is entirely too technical. *State v. Foster*, 61 Mo. 551.

RAILEY, C.—On February 2, 1914, plaintiff filed in the circuit court of Sullivan County, Missouri, his petition against the above named defendants, to quiet title to the northwest quarter of the southwest quarter of Section 36, Township 61, Range 21, located in Sullivan County, Missouri. Said petition avers:

"That the defendants and each of them claim and assert title to the aforesaid real estate, and that the claims of said defendants are adverse and prejudicial to the title and interest of plaintiff in said real property. Wherefore, plaintiff prays the court to try, ascertain and determine the estates, title and interests of plaintiff and defendants of, in and to the said real estate hereinbefore described, and by its decrees to adjudge, determine, settle, quiet and define the respective rights, titles, interests and estates of plaintiff and defendants to said real property; . . . and for all other proper orders and relief in the premises."

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Said petition was verified by the affidavit of plaintiff, which contained the following:

"And affiant further states that the defendants are non-residents of the State of Missouri."

On February 2, 1914, the clerk of the circuit court aforesaid entered of record, the following:

ORDER OF PUBLICATION.

State of Missouri, County of Sullivan—ss.

In the Circuit Court, May Term, 1914. Robert A. Creason, Plaintiff, v. Dazarene Yardley, and the Unknown Heirs, Consort, Devisees, Alienees and Immediate, Mesne, Remote, Voluntary and Involuntary Grantees of Oliver Myers, Deceased, Defendants.

Now at this day comes the plaintiff herein by his attorney, E. B. Fields, and files his petition and affidavit alleging among other things that defendants Dazarene Yardley and the unknown heirs, consort, devisees, alienees and immediate, mesne, remote, voluntary and involuntary grantees of Oliver Myers, deceased, are not residents of the State of Missouri; whereupon it is ordered by the clerk in vacation of court that said defendants be notified by publication that plaintiff has commenced a suit against them in this court, the object and general nature of which is to try, ascertain and determine the estate, title and interest of plaintiff and defendants in and to the following described real estate, lying and being in Sullivan County, Missouri, viz., the northwest quarter of the southwest quarter of section thirty-six in township sixty-one of range twenty-one; and that unless the said defendants be and appear at this court at the next term thereof to be begun and holden at the court house in the city of Milan in said county on the 4th day of May next and on or before said day answer or plead to the petition in said cause, the same will be taken as confessed, and judgment will be rendered accordingly. And it is further ordered that a copy hereof be published according to law in the Milan Standard, a newspaper published in said county of Sullivan, for four weeks successively, published at least once a week, the last insertion to be at least thirty days before the first day of said next May term of this court.

A. D. MORRISON,
Circuit Clerk.

A duly certified copy of this order was published in the Milan Standard on the 5th, 12th, 19th and 26th days of February, 1914, and proof of publication duly filed.

On May 5, 1914, being the first day of the May term, 1914, of said court, the defendant, Dazarene Yardley, filed her motion to quash the order of publication and the

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service thereof. Said motion, without formal parts, reads as follows:

Comes now the defendant Dazarene Yardley for the sole purpose of making this motion, and for that purpose only moves the court to quash the order of publication and service of process in this case, and for grounds of her said motion, says:

1. That said order and process is defective and irregular in this, that it does not comply with the provisions of Section 38 of Article 6 of the Constitution of the State of Missouri.
2. That said order and process is defective and irregular in this, that it does not comply with the provisions of Section 1770, R. S. of Missouri, 1910.
3. That said process and order does not run in the name of the State of Missouri as required by law.
4. That said order and process is not directed to the non-resident defendant Dazarene Yardley as required by the statute.
5. That said order and process does not state the object and general nature of the petition as required by the statute."

This motion was overruled on May 7, 1914.

Afterwards, during said May term, and on May 14, 1914, the court entered its judgment, as follows:

Now on this 14th day of May, 1914, the above cause comes on to be heard, and it appearing to the court that each of the above named defendants had been duly notified and served by publication according to law, and the issues all and singular being submitted to the court upon the pleadings and evidence adduced by the plaintiff, the court doth find, ascertain and determine that the plaintiff Robert A. Creason is the owner in fee simple of the land described in his petition, to-wit, the northwest quarter of the southwest quarter of section thirty-six in township sixty-one of range twenty-one in Sullivan County, Missouri, and that the defendants neither of them have any right or title in said lands. It is therefore ascertained, determined, decreed and adjudged by the court that the plaintiff is the owner in fee simple of the said lands, to-wit, the northwest quarter of the southwest quarter of section thirty-six in township sixty-one of range twenty-one in Sullivan County, Missouri, and that the defendants and each of them and all persons claiming by, through or under them be and are hereby forever barred from claiming or asserting any right or title to said lands or any part thereof. It is further adjudged that plaintiff pay the costs of this proceeding taxed at the sum of dollars.

On May 15, 1914, defendant, Dazarene Yardley, filed herein the following motion:

Comes now the defendant Dazarene Yardley and entering her appearance for the purpose of making this motion and for that

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purpose only moves the court to set aside its finding and judgment in this case for the following reasons:

1. Because the order of publication in this case is invalid and void, and its service conferred no jurisdiction on this court over this defendant.
2. Because the court erred in overruling defendant's motion to quash the order of publication and the service thereof.
3. Because the court has obtained no jurisdiction over this defendant.

On May 16, 1914, this last motion was overruled, and on the same day, said defendant, Dazarene Yardley, filed a motion in arrest of judgment, which said motion reads as follows:

Comes now the defendant Dazarene Yardley and entering her appearance for the purpose of making this motion and for that purpose only moves the court to arrest the judgment in this case, and for grounds of her said motion says;

1. That upon the whole record in said cause the judgment is erroneous.
2. That the court obtained and had no jurisdiction over this defendant.
3. That the court has no jurisdiction to render the judgment it rendered against this defendant.
4. That the order of publication in this case is invalid and void.

This motion was likewise overruled, and the cause duly appealed to this court by defendant, Dazarene Yardley.

Dazarene Yardley, is the sole appellant in this court, and has assigned several *alleged* errors of the trial court, as grounds for reversal.

I. It is claimed that the circuit court committed error in overruling appellant's motion to quash the order of publication, issued in this cause, and the service thereof. The order of publication is heretofore set out and speaks for itself. It does not purport to run in the name of the State of Missouri.

Writ Running in Name of State. Section 38 of article 6 of our Constitution provides that:

"All writs and process shall run . . . in the name of the 'State of Missouri.' "

Section 24 of article 4 of the Constitution reads as follows:

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"The style of the laws of this State shall be: 'Be it enacted by the General Assembly of the State of Missouri as follows.' "

It is not provided in section 38, *supra*, or elsewhere in the Constitution, that if the order of publication, in a case of this character, conveys the same information which it would impart if running in the name of the State of Missouri, that said process should be void or even voidable. This court, in discussing the above sections of our organic law, have always held them to be *directory* and not *mandatory* in their nature. [Davis v. Wood, 7 Mo. 162, 165; Jump v. Batton's Creditors, 35 Mo. l. c. 196; Doan v. Boley, 38 Mo. 449-50; City of Cape Girardeau v. Riley, 52 Mo. 424; City of St. Louis v. Foster, 52 Mo. 513; State v. Foster, 61 Mo. 549; Keating v. Skiles, 72 Mo. l. c. 101; Riesterer v. Land & Lbr. Co., 160 Mo. l. c. 151 et seq.; State ex rel. v. Cook, 178 Mo. 189, 193; Hansford v. Hansford, 34 Mo. App. l. c. 272; Bick v. Wilkerson, 62 Mo. App. l. c. 32-3; In re Mathiason Mfg. Co., 122 Mo. App. l. c. 444; Newcombe v. Kramer, 189 Mo. App. l. c. 541.]

The foregoing authorities clearly hold that section 38 of article 6 of our Constitution requiring that all writs and process shall run in the name of the State is merely *directory*.

Suppose the order of publication in this case, after setting out the names of the defendants, had contained the following: "The State of Missouri, to all of the above named defendants, greeting." Would it have imparted to the defendants, or either of them, any additional information in respect to the prospective litigation, not contained in the foregoing order of publication? We think not. Every person who read said order of publication knew that the plaintiff, Robert A. Creason, had sued defendant, Dazarene Yardley, and the unknown heirs, etc., of Oliver R. Myers, deceased, in the Circuit Court of Sullivan County, Missouri; that said cause was returnable to the next May term of said court; that the object and general nature of the action was to try, ascertain and determine the estate, title and interest of *plaintiff*

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and *defendants*, in and to the real estate in controversy. Every person who read the publication was advised that defendants were required to appear and answer or plead to the petition at the next term of said court, which was to be begun and held in the city of Milan, in the county aforesaid, on the 4th day of May, 1914. They were further advised that unless said defendants so appeared and answered or plead to said petition the same would be taken as confessed and judgment rendered accordingly. We are of the opinion that if said order of publication had contained *all* the *alleged* requirements pointed out by appellant, it would have afforded no more practical information than that contained in the order of publication as made.

In the brief filed by counsel for appellant it is said: “Although this requirement of the Constitution is directory, and its omission only an irregularity, yet it can be taken advantage of (as was done in this case) by motion to quash.”

It is true that this court, in Doan v. Boley, 38 Mo. l. c. 450, said:

“It is not contended that the writ was entirely void by reason of not running in the name of the State, but that it was simply voidable. *Undoubtedly it would have been quashed on motion of the court below, or it might have been amended on a direct application for that purpose.* It has been held that the provisions of the State Constitution requiring all writs and process to run in the name of the State of Missouri is merely directory, and therefore an omission to comply with the requirements would be merely irregularity. [Davis v. Wood, 7 Mo. 162.] . . . *The process here was certainly defective; it might have been taken advantage of at the proper time, but, as the parties did not avail themselves of the defect, it is cured by virtue of the statute.* [R. C. 1855, p. 1255, sec. 19.]” (Italics ours.)

The italicised portion of said opinion is relied upon by appellant in this case. It was not necessary to a decision of said cause, and, hence, was *obiter dicta*. If section 38 of article 6, supra, is simply *directory*, and the *order*

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of publication, as made, imparted the same information, as though it had run in the name of the State, we hold that it was, as published, in *substantial* compliance with the law, and that the trial court acquired jurisdiction over the person of appellant by said publication, although it did not run in the name of the State. Upon the filing of the petition in this cause, the circuit court of Sullivan County became vested with jurisdiction over the subject-matter of the action, and through said order of publication acquired jurisdiction over the person of appellant for the purpose of quieting the title to said property, although no personal judgment was, or could have been, entered against her, as she only appeared *specially* for the purpose of raising the question of jurisdiction.

It is to the interest of the Republic that the titles to real estate should be speedily settled. The appellant in this case had information as to the pendency of this action on or before the return day of said process. She has seen fit to rely upon technicalities to defeat the action, which do not go to the merits of the controversy. The publication in this case is no more subject to *special* attack than if the appellant had made *no* appearance to the action. The language referred to in Doan v. Boley, 38 Mo. *supra*, which is in conflict with the conclusion above announced, as well as that contained in other cases along the same line of reasoning, should not be followed.

Section 2082, Revised Statutes 1909, provides that:

"The Supreme Court, or Court of Appeals shall not reverse the judgment of any court, unless it shall believe that error was committed by such court against the appellant or plaintiff in error, and materially affecting the merits of the action."

The above, in connection with Section 2119, Revised Statutes 1909, justifies us in holding that the trial court committed no error in overruling appellant's motion to quash the order of publication.

II. In view of the conclusion reached in the preceding proposition, we do not deem it necessary to

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prolong this discussion by reviewing the other Other Grounds alleged grounds of error. We are of of Error. the opinion that the order of publication in this case was sufficient; that the trial court, by reason thereof, was vested with jurisdiction over the subject-matter and properly entered judgment in favor of respondent upon the service thus made.

The judgment of the trial court is accordingly affirmed.

PER CURIAM:—The foregoing opinion of RAILEY, C., is adopted as the opinion of the Court in *Banc. Graves, C. J., and Walker, Blair and Williams, JJ., concur. Faris and Woodson, JJ., concur in result. Bond, J., dissents.*

BRUCE ROPER v. LOUIS GREENSPON, Administrator of Estate of ROSE GREENSPON, JACOB GREENSPON, ABRAHAM GREENSPON and LOUIS GREENSPON, Composing Firm of JOSEPH GREENSPON & SONS, Appellants.

In Banc, December 1, 1917.

1. **NEGLIGENCE: Speed Ordinance: Invalidity: Pleading.** Where defendant pleads and relies upon a certain ordinance as a defense to plaintiff's charge of negligence, the invalidity of said ordinance should be pleaded, and if not pleaded it cannot be excluded as evidence on the ground that it is invalid.
2. _____: _____: **Invalidity Raised at First Opportunity: Waiver.** The invalidity of an ordinance, relied upon by defendant as a defense to plaintiff's action for negligence, like the unconstitutionality of a statute, should be raised at the first open door in the course of orderly procedure in the case, and if not so raised its invalidity is waived; and the ordinance being pleaded as a defense in the answer, the first opportunity for asserting its invalidity in this case was by an averment in the reply.
3. _____: _____: **Conflict With State Statute: Waiver.** If the answer pleads that plaintiff was guilty of contributory negligence in running his taxicab in excess of a certain speed ordinance pleaded, and plaintiff replies that the ordinance was in force and that he was not driving in excess of its speed rates, the court is not required to decide that said ordinance conflicts with a state statute on the same subject, neither can said ordinance be excluded from evidence on any such ground.

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4. _____: Exclusion Harmless Error. If the ordinance fixed a maximum speed of ten miles per hour and there was evidence that plaintiff's taxicab at the time of his injury was being driven by him at the rate of twenty-five or thirty-five miles, and the instruction made ordinary care the measure of plaintiff's duty, it was not harmless but prejudicial error to exclude said ordinance as evidence; for a rate in excess of the ordinance rate was negligence *per se*, and a rate in excess of that speed was contributory negligence and defeated plaintiff's right to recover, and without such ordinance the jury might find that a rate of even thirty-five miles per hour was ordinary care.
5. AUTOMOBILE SPEED: Power of City to Regulate. The Act of 1911 did not expressly or by intendment withdraw from cities the power to regulate the speed of automobiles upon their streets, nor does such act deprive cities of their power to enact valid ordinances providing reasonable speed and other regulations in the use of streets by automobiles.
6. ORDINANCE NEGLIGENCE: Unlighted Wagon. Where defendant's long-reach wagon, loaded with long steel beams, extending some eight feet beyond the hind axle, stalled at the intersection of two streets after nine o'clock at night, they were guilty of ordinance negligence for failure to have lights on the wagon, in obedience to an ordinance requiring all such vehicles, while in use upon the streets between the hours of sunset and sunrise, to "display one or more lights or lanterns on the outside of such vehicles, visible from front and rear," and are liable to the driver of an automobile who saw the wagon, but did not see the steel beams, with which he came in contact, and which were of the same color as the asphalt pavement—unless his right to recover is barred by his contributory negligence in driving at an excessive speed.
7. COMMON LAW NEGLIGENCE: Blocking Street. Evidence that a long-reach wagon, loaded with long steel beams, extending some eight feet beyond the hind axle, stalled after nine o'clock at night at the poorly-lighted intersection of two streets; that it sunk down into the asphalt pavement and remained there for thirty minutes or more; that the street which crossed the one in which it was traveling was a continuously used highway; that the wagon and beams blocked the whole of the south side of that highway, which was the side used by automobiles going east, as plaintiff's was; that neither the owners of the wagon nor their servants did anything in the way of performing their duty to the traveling public by way of warning or signals, and that plaintiff's taxicab collided with the steel beams and he was injured, is such evidence of common law negligence as entitled plaintiff to go to the jury on that issue.

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8. **CONTRIBUTORY NEGLIGENCE:** Question for the Jury. Where there is conflicting evidence on every vital question touching the negligence of plaintiff, the question of his contributory negligence is an issue for determination by the jury; and notwithstanding the evidence on that question preponderates in favor of defendants, the appellate court cannot declare as a matter of law that plaintiff was guilty of such contributory negligence as bars a recovery, even though all the testimony except his own, which is positively to the contrary, shows recklessness on his part at the time of the accident.

Appeal from St. Louis City Circuit Court.—*Hon. William N. Kinsey, Judge.*

REVERSED AND REMANDED.

Jones, Hocker, Sullivan & Angert and Vincent L. Boisaubin for appellant.

(1) The facts in this case show that plaintiff was guilty of contributory negligence as a matter of law, and therefore the court erred in refusing to give defendants' instruction in the nature of a demurrer to the evidence at the close of plaintiff's case and again at the close of the entire case. *Solomon v. Duncan*, 185 S. W. (Mo. App.) 1141; *Lorenz v. Tisdale*, 127 N. Y. App. Div. 433; *Rebillard v. Railroad*, 216 Fed. 503; *Const. Co. v. White*, 130 Tenn. 520; *Ry. Co. v. Vangilder*, 132 Tenn. 487; *Lauson v. Fond du Lac*, 141 Wis. 57; *McDonald v. Yoder*, 80 Kan. 25; *Bucholtz v. Radcliffe*, 129 Iowa, 28; *Wallower v. Webb City*, 171 Mo. App. 214. (2) The court erred in refusing to admit in evidence the speed ordinance pleaded in defendants' answer and offered in evidence in support of the defense. Said ordinance was not in conflict with the state statute and is valid. The court erred in refusing defendants' instruction submitting the city speed ordinance to the jury and instructing the jury that if they found a violation of said ordinance and that such violation contributed to the injuries plaintiff could not recover. The state statute did not attempt to regulate the speed of automobiles; it did not attempt to fix any speed limit upon au-

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tomobiles; it was silent on that upon which the city ordinance spoke; it did not expressly repeal the city ordinance regulating and fixing speed. The statute and the ordinance are, therefore, not in conflict, and the ordinance is valid. Laws 1911, p. 322; St. Louis v. Williams, 235 Mo. 518; St. Louis v. Klausmeier, 213 Mo. 126; St. Louis v. Ameln, 235 Mo. 682; St. Louis v. De Lassus, 205 Mo. 578; State v. Clarke, 54 Mo. 17; St. Louis v. Cafferata, 24 Mo. 94; People v. Bell, 148 N. Y. Supp. 753; Chicago v. Ice Cream Co., 252 Ill. 311; 2 Dillon on Mun. Corp., sec. 632; St. Louis v. Bernard, 249 Mo. 51; Brazier v. Philadelphia, 215 Pa. St. 297; Christensen v. Tate, 128 N. W. (Neb.) 622; Bellingham v. Cissna, 44 Wash. 397.

Sidney Thorne Able for respondent.

(1) Plaintiff was not guilty of negligence. Baker v. Fall River, 187 Mass. 53; Corcoran v. New York, 188 N. Y. 131; Carradine v. Ford, 187 S. W. 291; Strauchon v. Railway, 232 Mo. 587; Bluedorn v. Railway, 108 Mo. 488. On the issue of contributory negligence, plaintiff is entitled to the full force of all uncontested facts, and to all his controverted evidence, and to every reasonable and favorable construction and inference deducible from all the evidence. Peterson v. Railroad, 265 Mo. 462; Tabler v. Railway, 93 Mo. 79; Buesching v. Gaslight Co., 73 Mo. 231. Unless the only conclusion that can reasonably be drawn from the evidence is that plaintiff was guilty of contributory negligence—only when there can reasonably be no two opinions on the subject, should a demurrer to the evidence be sustained. Campbell v. Railway, 175 Mo. 161; Buesching v. Gaslight Co., 73 Mo. 233. Where there is a flagrant violation of a law or municipal regulation, resulting in an injury, contributory negligence should be clearly made out before the court relieves the defendant upon that ground. Bluedorn v. Railway, 108 Mo. 437; Coffee v. Carthage, 186 Mo. 573; Towler v. Sedalia, 77 Mo. 443. The law will not concern itself over closely in scruti-

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nizing and gauging the judgment of men facing confusing perils. *Wilson v. Railroad*, 169 Mo. App. 405; *Corcoran v. New York*, 188 N. Y. 140; *Underwood v. Railway*, 190 Mo. App. 418. (2) The trial court did not err in refusing to admit in evidence the so-called speed ordinance of St. Louis, as the Motor Vehicle Act is "exclusively controlling" on the regulation of the speed of motor vehicles on the public highways throughout the State. The court did not err in refusing defendant's instruction based upon the ordinance. The State, by the express words used in the act, exercised its prerogative and made the Motor Vehicle Act the exclusive law on this subject in Missouri. *Ewing v. Hoblitzelle*, 85 Mo. 64; *Ferrenbach v. Turner*, 86 Mo. 419; *Building Assn. v. Telephone Co.*, 33 Mo. 267; *Marie v. Transit Co.*, 116 Mo. App. 22; *St. Louis v. Klausmeier*, 212 Mo. 127; *St. Louis v. Meyer*, 185 Mo. 583; 17 Cyc. 871-872; *Byrne v. Drain*, 60 Pac. 433; 36 Cyc. 1114 and 1115; *State v. Kessels*, 120 Mo. App. 233; *Peterson v. Railroad*, 265 Mo. 462; *State v. Yardley*, 95 Tenn. 546; *Smith on Municipal Corporations*, sec. 544; *People v. Hayes*, 66 Misc. (N.Y.) 608; *Buffalo v. Lewis*, 192 N.Y. 193; *Frisbie v. Columbus*, 80 Ohio St. 686; *Helena v. Dunlap*, 102 Ark. 131; *Christensen v. Tate*, 128 N.W. (Neb.) 622; *Ex parte Smith*, 146 Pac. 82; *St. Louis v. Packing Co.*, 141 Mo. 375; *State v. Jaeger*, 63 Mo. 405; *Brazier v. Philadelphia*, 215 Pa. St. 297; *Bellingham v. Cissna*, 44 Wash. 397.

GRAVES, C. J.—This case reaches us upon a certification by the St. Louis Court of Appeals. Lengthy opinions upon both sides of the conceived vital questions appear.

The action is one for personal injuries, alleged to have been occasioned by the negligence of defendants. The petition counts upon both ordinance and common law negligence, in this language: "Plaintiff for his cause of action states that on or about the fourteenth of July, 1912, at about nine-forty-five p. m., between sunset and sunrise, plaintiff being then and there a chauffeur in the employ of

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and driving a taxicab for the St. Louis Taxicab Company, drove in an easterly direction along the right or south side of Lawton Avenue to Channing Avenue, both being public highways in a residence section of the city of St. Louis, Missouri; that the defendants were at the aforesaid time the owners of a wagon, loaded with heavy steel 'I' beams which extended eight or ten feet behind the rear of the wagon, and two horses, in the possession of a driver, the servant and employee of the defendants, who was then and there in charge of same for defendants, which wagon and team were at the time aforesaid facing north on Channing Avenue at the intersection of Lawton Avenue, standing across and blocking Lawton Avenue; that there was no light or lantern displayed on the outside of said wagon; that at said time there was in force a certain ordinance of the city of St. Louis, Missouri, providing that:

“ ‘On every hackney carriage, cab or cabriolet, when driven upon the streets between the hours of sunset and sunrise, shall have fixed on some conspicuous part of the outer side thereof, two lighted lamps, with plain glass fronts and sides, on which shall be painted in legible figures, at least one inch long, the registry number thereof. Every automobile, when upon any public street, shall carry between the hours of sunset and sunrise at least two lighted lamps showing white lights visible at least two hundred feet in the direction toward which the automobile is proceeding, and shall also exhibit at least one red light visible in the reverse direction. All other vehicles while in use upon the streets between the hours of sunset and sunrise, shall display one or more lights or lanterns on the outside of such vehicles, visible from front and rear,’

being Section No. 1349; that on account of the negligence of defendants, their servant and employee in failing to observe the requirements of said ordinance and in failing to display a light or lantern on outside of said wagon at aforesaid time, being between the hours of sunset and sunrise, plaintiff driving taxicab east on right or south side of Lawton Avenue, as aforesaid, exercising due care for his own safety, was unable to see said unlighted wag-

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on loaded with heavy steel 'I' beams, drove into and against the ends of the heavy steel 'I' beams, which extended eight or ten feet from the rear of said wagon, injuring himself as hereinafter stated.

"Plaintiff further states that the defendants, their servant and employee, carelessly and negligently allowed the said wagon, loaded with heavy steel 'I' beams, which extended eight or ten feet behind the wagon, to come to a standstill on Channing Avenue across Lawton Avenue, a much used public highway, on a dark night at aforesaid time, carelessly and negligently permitting it to remain there for thirty minutes or more while driver, a servant and employee of defendants, of said wagon owned and about the business of defendants at said time, unhitched the team from the wagon, argued the advisability of trading teams with another driver, a servant and employee of defendants driving another wagon for said defendants at said time near said place, and re-hitched same team to said wagon, without giving any signal or warning to approaching vehicle driven by plaintiff and without displaying a light on the heavy steel 'I' beams which extended eight or ten feet from the rear of the wagon and in the path of east-bound traffic on Lawton Avenue; each and all of which acts and omissions on the part of defendants, its servants and employees, proximately and directly contributed to the aforesaid accident and injuries resulting therefrom to plaintiff hereinafter stated.

"Plaintiff further states that said driver, a servant and employee of defendants, was not a fit or proper person to be intrusted with the said team and wagon of defendants, loaded with heavy steel 'I' beams which extended eight or ten feet from the rear of said wagon, all of which was known by defendants or by the exercise of due and proper care might have been known to the defendants prior to the fourteenth day of July, 1912."

The answer is (1) a general denial and (2) contributory negligence. The plea of contributory negligence was divided into two parts, i.e. (1) acts of the plaintiff other than the alleged violation of a city ordinance and (2) the violation of the following city ordinance: "No automobile, motor vehicle, locomobile or horseless ve-

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hicle propelled by the use of electricity, gasoline or steam, by whatever name such vehicle may be known, whether used for purposes of pleasure or business, shall be moved or propelled along, over or upon any public street, avenue, boulevard or other public place, at a greater rate of speed than is reasonable, having regard to the traffic and use of such street, avenue, boulevard or public place, or so to endanger the life or limb of any person, or the safety of any property, and shall not in any event, while upon any such street, avenue, boulevard or public place, be moved or propelled at a greater rate of speed than eight miles per hour in the business portions of the city, and not greater than ten miles per hour in the other portions thereof; and when turning a corner of intersecting streets, avenues, boulevards, or public places, or when traversing a curve or turn in a street, avenue, boulevard or public place where the view is obstructed, the rate of speed shall not be greater than six miles per hour. The term and words 'business portions of the city' as used in this ordinance shall be construed to mean the territory of the city contiguous to a street, avenue, boulevard or public place, which is at a particular point principally built up with structures devoted to business."

The reply placed in issue all the new matters in the answer. Upon a trial before a jury plaintiff had a verdict for \$3000, and from a judgment thereon defendant appealed to the St. Louis Court of Appeals, and the case is now here in the manner above stated. Points made and the evidence bearing thereon will be left to the opinion.

I. In the trial of the case the defendant offered in evidence the ordinance as to speed pleaded in the answer, and the court excluded such ordinance, to which action exceptions were well preserved. The defendant further preserved the point by asking ^{as Evidence.} an instruction based upon the ordinance, which the court refused, and an exception was duly saved to this action. As we gather it from the record the

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trial court was of the opinion that this ordinance was in conflict with the statutes of the State. The reply had not pleaded the invalidity of the ordinance, but denied that plaintiff had violated it in the running of his taxicab.

We think there was error in the exclusion of this ordinance, and for two reasons, (1) because the ordinance conflicts with no state statute, and (2) because the validity of the ordinance was not challenged in the reply, although the ordinance had been pleaded in *haec verba* in the answer.

It is true that an ordinance of a city which conflicts with a state statute is void, but if a party is relying upon that fact, such invalidity should be pleaded, where it appears, as here, that the adverse party had pleaded and is relying upon such alleged invalid ordinance. The invalidity of a statute or ordinance should be raised at the first opportune moment, and in this case that opportune moment was the reply. But this reply in this case proceeds upon the theory that the ordinance is valid, and specifically denies that plaintiff was driving "at a rate of speed greatly in excess of and in violation of an ordinance of the city of St. Louis, Missouri, at said time in force, and known as Section 1551." From this it appears that the plaintiff, not only did not plead the invalidity, but on the contrary in his reply avers that said ordinance was "at said time in force." This amounts to a waiver of the alleged invalidity of the ordinance, and it comes too late, when it is urged for the first time when the ordinance is offered in evidence. We take it that the invalidity of an ordinance, like the unconstitutionality of a law, must be brought in at the first open door under the orderly procedure in the case. [Lohmeyer v. St. Louis Cordage Company, 214 Mo. 685.] If the cause of action be founded upon a pleaded ordinance, the answer would be the first open door. If the defense in its answer relies upon a pleaded ordinance, then the reply would be the first open door. So that we conclude, as both opinions of the Court of Appeals conclude, that the invalidity of this ordinance is not in the case.

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We do not agree with the minority opinion that its exclusion was harmless error. If this ordinance should have been admitted, as we conclude, then its rejection was potential error. It is true that the plaintiff, testifying in his own behalf, says he was only running six to eight miles per hour, but much testimony shows that he was running at a much greater rate of speed. Some witnesses place his speed at from 25 to 35 miles per hour. The defendant, if this ordinance had been in evidence, would have been entitled to an instruction to the effect that if plaintiff was running his taxicab at a rate of speed in excess of the named rate of speed in the ordinance, then he was guilty of negligence, and that if this particular ordinance negligence contributed to his injury, he could not recover, although the defendants were guilty of negligence. This character of an instruction the defendants asked, but with the ordinance excluded from the case, they were not entitled to it, and it was refused. Had the ordinance been in evidence they would have been entitled to it.

The harmfulness of the refusal of this ordinance and thereby the preclusion of a proper instruction based thereon, is made apparent when we examine the principal instruction given for plaintiff. This instruction made the exercise of "ordinary care" the measure of plaintiff's conduct as he approached the wagon. The term "ordinary care" covered the speed of his taxicab, as well as his other conduct. Excluding this ordinance a jury might find that a speed of 35 miles per hour was the exercise of ordinary care, whilst under the ordinance such rate would not be the exercise of ordinary care, but would be negligence *per se*, and if such negligence contributed to the injury, no liability would follow. The exclusion of this ordinance was not only error, under the issues raised by the pleadings, but was error of the most harmful kind, and for which the judgment will, at least, have to be reversed.

II. Whilst under the pleadings in the case the invalidity of this ordinance is not really a question, yet we

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think the ordinance a valid one, and as the question will no doubt come up on a re-trial of the case (if we conclude it should be retried), under an amended reply, we deem it best to discuss the point.

Validity of Automobile Speed Ordinance In the year 1911, the Legislature revised the automobile laws of the State. [Laws 1911, p. 322, et seq.] These laws cover divers matters with reference to automobiles, and the running thereof, in this State. Section 1 of this act repeals chapter 83, Revised Statutes 1909, and enacts a new chapter to be known as Chapter 83. The second section reads:

"Except as herein otherwise expressly provided, this article shall be exclusively controlling:

"(1) Upon the registration, numbering and regulation of motor vehicles, and the licensing and the regulation of chauffeurs;

"(2) On their use of the public highways, and

"(3) On the accessories used upon motor vehicles and their incidents and the speed of motor vehicles upon the public highways;

"(4) On the punishment for the violation of any of the provisions of this article."

Section 9 of said act reads: "Every person operating a motor vehicle on the public highway of this State shall drive the same in a careful and prudent manner and at a rate of speed so as not to endanger the property of another or the life or limb of any person: Provided, that a rate of speed in excess of twenty-five miles an hour for a distance of one-half of a mile shall be presumptive evidence of driving at a rate of speed which is not careful and prudent."

The contention of the plaintiff, in effect is, that this Act of 1911 precludes cities from fixing a speed limit. If such is the effect, the sooner it is known the better. When this whole act is read, I do not believe that a speed limit ordinance fixing a rate of less than twenty-five miles per hour conflicts with this state law. The idea that the Legislature designed and intended to preclude

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speed limit ordinances absolutely in cities, towns and villages, by this act, is a striking one. The only thing said by the act about speed is that a rate of speed in excess of twenty-five miles per hour for a distance of one-half mile shall be presumptive evidence of driving at a rate of speed which is not careful and prudent. The prior portion provides for prudent driving and a rate of speed so as not to endanger the life or property of another. It will be noted that the last portion of the section only says what shall be presumptive evidence of imprudent driving. The question is, can this section 9, when read in connection with section 2, supra, be held to make all speed ordinances of cities, towns and villages void? Did the Legislature intend to say that an automobile could be driven through the most active street in the great city of St. Louis at twenty-five miles an hour, and the act itself would not be presumptive negligence? Did the Legislature with no practical knowledge of conditions in congested centers, or of the conditions of the streets and highways thereof, intend to preclude the lawmaking bodies of such places from regulating speed of vehicles therein, in the exercise of the police powers? If it did, it is well to know it, to the end that the next Legislature may undo such a vicious act. According to plaintiff's contention, drivers of these machines have practically an unbridled license to run twenty-five miles per hour through the most congested streets of the most populous city in the State, and the municipality, through its legislative body, is utterly helpless. This, because the act itself does not show negligence until a speed in excess of twenty-five miles per hour is reached, and fixes no speed limit whatever.

In my judgment there is nothing in this act which tends to show a legislative intent to withdraw from cities, towns and villages the police power which they now possess, and for years, have possessed, to regulate traffic upon their streets. That prior to this Act of 1911 the city of St. Louis, in the exercise of its police power, theretofore delegated to the city by the State, had the

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right to pass and enforce the ordinance in question, there can be no doubt.

Was it the intent of the Legislature, by this Act of 1911, to withdraw from the city the grant of police power theretofore made in this behalf? We think that no such intent can be gathered from the act, when read in its entirety. That the city had the right, under its police power, to pass speed ordinances prior to this act must be conceded, and if there is no intent of the law makers expressed in the Act of 1911 to withdraw this police power, the city still possesses it. All over this State were cities, towns and villages having regulatory ordinances with reference to traffic upon their streets by motor vehicles, and the Legislature knew this fact, and further knew that such ordinances had been enacted and enforced through the police powers granted to such municipalities of the State by the Legislature, and yet we find no language in this Act of 1911 indicating an intent to amend the divers municipal charters, by the withdrawal from such municipalities of the police power, under which they could control their streets in this regard. Before we hold that this police power has been withdrawn from these municipalities of the State, the legislative language will have to be more explicit than that found in this Act of 1911. We hold the ordinance in question a valid one, and that for this reason there was error in refusing to admit it in evidence.

III. It will be noticed that the plaintiff's petition is predicated both upon ordinance negligence and common-law negligence. Both opinions from the Court of Appeals hold that there was no liability under the facts, growing out of the alleged ordinance negligence. This calls for a short detail of the facts. Defendants were engaged in the iron and steel business. The accident occurred in the night time. Plaintiff was driving his car east on Lawton Avenue, and the collision occurred at the intersection of Lawton Avenue and Channing Avenue. Defendants had a long "reach wagon" loaded with some

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large "I" beams. These beams extended some eight feet or more beyond the hind axle of the wagon. The evidence conflicts on how far they extended. They were about the color of the asphalt street surface below them. The wagon wheels had cut into the soft asphalt street and the wagon was stalled there. Another team and wagon of the defendants with its driver was near. The two drivers were devising means of extricating the "stalled" wagon, when the accident occurred. This "stalled" wagon was across Lawton Avenue in Channing Avenue. The evidence conflicts as to whether the wagon with its protruding beams was so located as to stop all passage of automobiles on the south side of Lawton Avenue, the side to be used by vehicles going east. There is testimony for the plaintiff to the effect that a vehicle could not pass between the ends of the iron beams and the curb, or in other words that the wagon and its protruding beams blocked the whole south side of Lawton Avenue. Plaintiff says that he discovered the wagon before he got to it, but could not see the beams. That upon seeing the wagon he veered his machine so as to miss the wagon, and struck, the beams. There is evidence that defendants had no lights upon the wagon, and that the only lights at this street intersection on this Sunday night were two single-burner gas lights situated on diagonal corners of the intersection, which gave very little light upon this place where the wagon was standing. As stated the evidence tends to show, from plaintiff's side of the case, that these iron beams were near the color of the asphalt below them, and therefore hard to distinguish from it.

The portion of the ordinance, which is applicable to this wagon, reads: "All other vehicles, while in use upon the streets between the hours of sunset and sunrise, shall display one or more lights or lanterns on the outside of such vehicles, visible from front and rear."

The point made by our brothers of the Court of Appeals is that a failure to comply with this ordinance, was not the proximate cause of the injury, for the reason that plaintiff actually saw the wagon, according to his own testimony. It is true that he did see the wagon (in dim

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outline), as can be inferred from his testimony, yet he says that he did not see the iron beams thereon. It is also true, as suggested by our brothers, that a lantern placed on the front portion of this load, so as to be visible both from front and rear, would be a compliance with the ordinance, but it does not follow from this that the jury could not conclude, from all the facts, that the absence of this light (even on the front end of the load) was the cause of the injury. Such a light, so located, might have, and no doubt would have, indicated to plaintiff the true character of the load on the wagon. A glance at such beams would or might have indicated to him that they were liable to extend beyond the rear wheel, although it be granted that the light on the front end of the load might not have so lighted the protruding ends of the beams as to make them visible. In other words, this light would have shown the character of the load on the wagon, and with a knowledge that the wagon was so loaded, might have indicated to plaintiff that the beams protruded beyond the rear wheels. We think that ordinance was a proper matter for the consideration of the jury under proper instructions. To this extent we agree to neither of the learned opinions from the Court of Appeals. The case, in so far as ordinance negligence is concerned, should go to the jury, unless the plaintiff is barred by his contributory negligence, a question we get to later.

IV. Going now to the common-law negligence. If it be a fact that the intersection was poorly lighted, as there is evidence tending to show; and, if it be a fact that this wagon and its load blocked the whole
Common Law Negligence. south side of Lawton Avenue, and most of the north side, as there is some evidence tending to show; and, should it further appear that this highway running east and west was being continuously used, and that the travelers to the east used the southern portion of the street, we are not prepared to say that this negligence should not likewise have gone to the jury. True it is that the mere stopping of the wagon under the circumstances was not negligence, nor

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was the delay of thirty minutes or more in getting it out, negligence, but if it was dark and the wagon's contents could not be seen, and the wagon and its contents did in fact block the travel of that portion of the avenue, we are inclined to think that the defendants and their agents owed some duty toward the traveling public, by way of warning or signals of some kind. The Court of Appeals in the majority opinion makes no direct ruling contrary to these views, but passes to the question of plaintiff's contributory negligence as a matter of law, and holds that plaintiff was barred by his contributory negligence, and it is largely upon this question that the two opinions differ. The question of contributory negligence we take up next.

V. In the Court of Appeals, as here, the real crux of the case is the alleged contributory negligence of the plaintiff. It was upon this point that the Court of Appeals divided, the majority being of the view that the plaintiff should be declared guilty of contributory negligence as a matter of law. The question is one of fact, and we do not believe that the facts in the record call for a peremptory instruction to find for defendant on the ground of plaintiff's contributory negligence. To do so would require us to ignore as unworthy of belief the testimony of the plaintiff when testifying in his behalf. As we have already indicated, the evidence conflicts as to the speed at which plaintiff was driving. The testimony of the plaintiff, if believed, shows that he was not negligent in this regard. It is true much testimony tends to show his recklessness at the time, but the credibility of all this testimony was for the jury.

It is further true that a witness testified that the protruding beams could be seen for a hundred feet or more, and were so seen that night, but plaintiff testifies that he could not and did not see them. It is further true that the evidence largely predominates to the effect that there was ample room between the ends of these beams and the curb for the safe passage of a

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taxicab, and that vehicles did actually so pass whilst the wreck of the collision was there, yet on the other hand one witness for plaintiff, who drove up to the place with a motor car, says that he arrived there whilst the taxicab was yet under the beams, and that the beams extended closer to the curb than the taxicab which had been driven by plaintiff, and that a taxicab could not pass between these beams and the curb. This witness even says that he looked over the situation with the view of driving his car through. So, throughout this testimony upon all vital questions touching the negligence of the plaintiff there is a conflict. It is true that the preponderance is against the plaintiff, but whilst this matter is one of material consideration by the trial court, it is not a question here after verdict and judgment. Without further details of the evidence, it is sufficient to say that there was evidence which would carry the question of contributory negligence to the jury. The conditions as to the character of the light at this crossing at the time is in conflict. In fact, every question upon which might be predicated the negligence of the plaintiff is wrapped up in conflicting evidence. What we might do, if sitting as a jury, is beside the question. The demurrer to the evidence was rightfully overruled, but for the error heretofore pointed out the judgment *nisi* should be reversed, and the cause remanded for a new trial. It is so ordered.

Walker, Faris, Woodson and Williams, JJ., concur; Bond, J., concurs in result; Blair, J., concurs in paragraphs 1, 3, 4 and 5 and in result.

THE STATE ex rel. E. R. CLARK et al. v. C. S.
WEST et al.

In Banc, December 1, 1917.

1. **MANDAMUS:** Demurrer to Alternative Writ: Admissions and Facts.
A demurrer by respondents to the alternative writ in mandamus confesses the truth of the allegations therein contained, and the facts of the case are to be ascertained from the writ.

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2. _____: **Discretion: Controlled by Mandamus.** If the county court was not compelled by the statute to make a different order from the one it did make, but was invested with a discretion to exercise judgment in the matter, its action cannot be controlled by mandamus, unless its exercise was palpably arbitrary.
3. _____: **County Court Drainage Act: Amendment of 1913: Discretion as to Necessity for Improvement.** Section 5583 of the County Court Drainage District Act of 1913, Laws 1913, p. 272, if considered alone, without reference to the context, or to the succeeding sections of the act, requires the county court to make an order incorporating a drainage district in cases where the owners of a majority of the acres in the proposed district petition therefor. But such a construction would render the next section (Sec. 5584, Laws 1913, p. 273) meaningless and futile, and Section 5583 itself unconstitutional and void. The two sections must be read together, and when that is done they authorize the county court, even when a petition for incorporation signed by the owners of a majority of the acres in the proposed district is presented, to determine whether or not the improvement is "necessary for sanitary or agricultural purposes, or would be of public utility or conducive to the public health, convenience or welfare," and a determination by the court, after the filing of a remonstrance and an orderly public hearing, that the proposed improvement is not necessary for any of these purposes, cannot be nullified by mandamus.
4. _____: _____: **Constitutionality: Who May Raise Question.** The court in construing a statute may take a view of it which renders it constitutional, whether or not respondents, being mere officers, have a right to raise the question of constitutionality, even when a contrary construction would render it invalid.
5. _____: _____: _____: **Private Property for Public Use: Judicial Question.** Whether the use to which it is proposed to devote private property by the organization of a drainage district is a public or private use, is a judicial question.
6. _____: _____: _____: **No Hearing.** A statute which would authorize the taking of private property for the use of a drainage district without affording the owner an opportunity to have the question of whether the use is a public or private one judicially determined, would be unconstitutional; and a statute which would compel the county court, upon the presentation of a petition signed by the owners of the majority of the acres in a proposed drainage district, to make an unconditional and final order incorporating such district with powers to construct ditches and levees, and levy taxes on all lands therein to pay for same, with no opportunity on the part of the owners of the remaining acres to be heard on the question of the necessity and public utility of such improvement, would be such a statute.

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Mandamus.

WRIT DENIED.

N. M. Bradley and W. D. Summers for relators.

(1) Section 5883, as amended, says: "If the court finds that the owners of a majority in acreage of the proposed district are petitioners, or have joined in prayer of said petition for said district or improvement, by motion, then the court shall . . . find in favor of making the improvement." *Reagan v. County Court*, 226 Mo. 79.

(2) Mandamus is the proper remedy in this case. State ex rel. v. Cramer, 96 Mo. 84; State ex rel. v. Public School, 134 Mo. 307; 26 Cyc. 162; State ex rel. v. Brown, 172 Mo. 374; State ex rel. v. Buhler, 90 Mo. 560; State ex rel. v. Phillips, 97 Mo. 331. "It has been said that it would be a monstrous absurdity in a well-organized government that there should be no remedy, although there should appear a clear and undeniable right." State ex rel. v. County Court, 48 Mo. 475; *Sheridan v. Fleming*, 93 Mo. 321; State ex rel. v. County Court, 41 Mo. 225; *In re Dunklin County v. Distr. Co.*, 23 Mo. 449; State ex rel. v. McCracken, 60 Mo. App. 651. "Ever since the 12 Mo. 166, mandamus has been regarded as the proper proceeding to compel recalcitrant county courts to do their duty." State ex rel. v. Fraker, 166 Mo. 140; citing *Riley v. City*, 31 Mo. App. 439. "Hearing evidence does not convert the matter into a judicial inquiry." State ex rel. v. Guinote, 113 Mo. App. 407; State ex rel. v. Reynolds, 121 Mo. App. 699. The county court can be required by mandamus to do their duty. State ex rel. v. Butler County Ct., 164 Mo. 214; State ex rel. v. Patterson, 207 Mo. 129. Section 5583, withdraws the right to remonstrate, if a majority sign the petition, and makes it mandatory that the county court incorporate the ditch. Laws 1913, p. 271. "A formal finding or declaration of the necessity of improvements is not necessary, unless the statute specifically requires the same." 2 *Page & Jones on Taxation*, secs. 803, 832; *Joplin v. Freeman*, 125 Mo. App. 717; State ex rel. v.

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Grim, 220 Mo. 489; State ex rel. v. Bidwell, 136 Mo. App. 503; State ex rel. v. Keeze, 40 Mo. App. 650. (3) The constitutionality of a law is never presumed and it must be shown clearly to be unconstitutional. State ex rel. v. Pike County, 144 Mo. 275. General allegation that a statute is unconstitutional does not raise the issue. The provision of the Constitution violated must be pointed out. Ash v. Independence, 169 Mo. 77; State ex rel. v. Smith, 176 Mo. 44. (4) The respondents, not being personally interested and their rights not being affected, cannot raise or urge the question of the constitutionality of the statute. The demurrer admits that the question was not raised by the objectors in the county court, and the respondents cannot urge the same for them here. 25 Am. & Eng. Ann. Cases, 151; State ex rel. v. Williams, 232 Mo. 56.

J. R. Nicholson, A. A. Whitsitt, J. S. Brierly and T. N. Haynes for respondents.

(1) Before the county court had the power to incorporate the proposed drainage district it was necessary that they should hear evidence in addition to the report of viewers, as to whether or not the proposed improvements were necessary and conducive to the public health, convenience or welfare, or would be of public utility and benefit. R. S. 1909, sec. 5578. (A) In order that the court might be correctly informed to pass upon the questions and matters necessarily required by section 5578 to give the court jurisdiction and power to act and incorporate, the statute provides that the court shall appoint viewers and an engineer who shall report their findings in writing, with such maps, profiles and drawings as are necessary to advise the court, and that after the report of viewers is filed the court shall hear and determine the petition, the report of viewers and the grievances set forth in the remonstrance. Secs. 5583 and 5584, Laws 1913, p. 271. (B) The report of viewers is advisory only as to the matters set forth in their report, and is not binding upon the court. State ex rel. v. Taylor, 224 Mo. 475;

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Drainage Dist. v. Railroad, 236 Mo. 107. (C) In the county court proceedings it was incumbent upon relators to satisfy respondents, sitting as such county court, as to the practicability of the proposed improvements, and whether or not such proposed improvements were necessary and conducive to the public health, convenience or welfare, or would be of public utility and benefit; to do this it was necessary that respondents, sitting as such county court, hear evidence as to the questions of fact at issue; and respondents, having heard the evidence and made a finding, as alleged in relators' petition, their acts in so doing were judicial, and whether the conclusions arrived at were right or wrong, they are not subject to review by mandamus. Heman v. Flad, 108 Mo. 614; State ex rel. v. Broaddus, 209 Mo. 107; State ex rel. v. Hudson, 226 Mo. 239; State ex rel. v. Gentry, 112 Mo. App. 589; State ex rel. v. Oliver, 116 Mo. 188; State ex rel. v. Thornhill, 174 Mo. App. 469; High on Extraordinary Remedies, 230, 102; 18 Ruling Case Law, p. 124, sec. 38; State ex rel. v. Johnson, 266 Mo. 662; State ex rel. v. Jones, 155 Mo. 576; 26 Cyc. 158-161; In re Drainage Dist., 90 Wis. 301; Fleming v. Hall, 73 Iowa, 592. (2) If, as contended by relators, the word "shall" as used in Sec. 5583, R. S. 1909, as amended by Laws 1913, p. 272, be construed to make it mandatory upon the county court to grant the prayer of the petition and incorporate the drainage district upon a finding by the court that the majority of owners in acreage are petitioners, or join in the prayer of the petition, regardless of a finding by the court as to whether or not the proposed improvement shall be conducive to the public health, convenience or welfare, or where the same will be of public utility or benefit, and necessary to drain any lots, lands, public or corporate roads or railroads, as required by section 5578, then said act attempts to usurp the judicial functions of the courts, and is null and void, because violative of the provisions of both the Federal and State Constitutions. U. S. Constitution, sec. 1, art. 14, second subdivision of article 6, and secs. 1 and 2, art. 3; Mo. Constitution, sec. 20, art. 2, section 30 of article 2, subdivisions 17 and 33 of section 53 of article 4;

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and section 1 of article 6; *Savannah v. Hancock*, 91 Mo. 54; *Mining Co. v. Joplin*, 124 Mo. 129; *Aldridge v. Spears*, 101 Mo. 400; *Mills on Em. Domain*, sec. 11; *Lewis, Eminent Domain*, sec. 238; 10 R. C. L., p. 18, sec. 15, page 30, sec. 27; 15 Cyc. 580; *Cooley on Constitutional Lim.* (7 Ed.), pp. 132, 244; 9 R. C. L., p. 623-4, secs. 8 and 9; 6 R. C. L., pp. 453, 456.

FARIS, J.—This is an original proceeding by mandamus, whereby relators seek to compel respondents, as judges of the County Court of Cass County, to make an order organizing certain lands of relators and others situate in Cass County into a drainage district, under the provisions of article 4, chapter 41, Revised Statutes 1909, as amended by an act approved March 27, 1913. [Laws 1913, pp. 271-281.] This is the County Court Act, so-called to distinguish it from a similar but procedurally different proceeding whereof the jurisdiction lies in the circuit courts.

Upon the issuance of our alternative writ respondents demurred, thus in effect confessing, for the purpose of this inquiry, the truth of all allegations contained therein. The facts in the case are therefore to be found in the alternative writ. This writ is lengthy and since no point is made touching its form, we may more briefly state the facts by epitomizing it and making excerpts from it. Reached in this way, the facts run thus: Petitioners are the owners of certain swamp and overflowed lands situate on and along Big Creek, in Cass County, Missouri; desiring to ditch and drain said lands, and having in contemplation the construction of ditches and improvements more than five miles in length, petitioners to the number of more than five, being the owners of a majority in acreage of the lands in the proposed district, filed with respondents, as members of the County Court of Cass County, a petition with the necessary allegations touching the nature of the proposed improvements and the route and termini of the same. They likewise filed a proper bond, which was approved by respondents. Respondents thereupon, as such court,

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appointed three disinterested freeholders, and an engineer, who properly qualified and proceeded to view the lands proposed to be embraced in the district. Said viewers and engineer found, and so reported to the respondents, that the proposed improvement was necessary, practicable, and would be of public utility, and conducive to the public health, convenience and welfare. The viewers and engineer also indicated in and by their report the character, dimensions, location and probable cost of the drainage necessary to accomplish the objects of the petition.

After the filing of the report of the viewers and engineer, respondents made the proper orders of record, and caused a proper notice to be given by publication in a newspaper of the pendency of said petition, together with such other facts as are required in that behalf by the statute, and fixed a day at which the petition and the report of the viewers would be heard. Upon the day so fixed for the hearing of the petition "a remonstrance was filed by persons interested in land that would be affected by said proposed ditch and improvement, in which said remonstrance it was admitted that the proposed improvement contained swamp and overflowed land," but said remonstrance objected to the location of the improvements, as fixed by the petition and viewers' report, and set forth other grievances. Respondents thereupon proceeded to hear both the petitioners and the remonstrators, and at the conclusion of the hearing dismissed the petition, as will appear by their order made in the premises, which in full reads thus:

"Now on this 6th day of December, 1916, the day set for the hearing of the petition, the report of the viewers heretofore appointed thereon and any objections on the part of any of the landowners within the boundaries of the proposed drainage district who might remonstrate or object to the proposed improvement and report of viewers, and it appearing to the court that due notice of the filing of said report was given

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according to law, and come now the petitioners and also T. J. George, W. W. Linn, N. Mickelson, T. W. Dean, Clara Reed, Addie Harris, C. L. Harris, M. Gray, Mark H. Beamer, N. N. Mills, G. W. Everett, H. K. Templeton, J. A. James, S. A. Thompson, Edna and W. E. Templeton, H. H. Sides, O. T. Souther, as remonstrators, and filed herein their remonstrances and objections to the formation and incorporation of said proposed improvements, and thereupon this cause is by the court now taken up for hearing and the court having heard the pleadings, evidence and arguments of counsel and being fully advised in the premises, doth find that the petitioners, and those joining by motion in the prayer of said petition, own a majority of the acreage of the lands within the boundaries of said proposed district, and the court doth further find by the great preponderance of the evidence adduced that the proposed ditch, levee and other improvements are not necessary for sanitary or agricultural purposes, nor would they be of public utility, nor conducive to the public health, convenience or welfare nor are they practicable and the court doth find against such proposed improvements and doth dismiss the said petition and proceedings at the cost of the petitioners.

"It is therefore considered and adjudged by the court that the petition and proceedings be and the same are hereby dismissed and that remonstrators go hence without day and have and recover from and against the petitioners as follows: E. R. Clark, L. W. Bixler, S. R. Sankey, James S. Gosnell, Louise Naden, H. H. Hodgson, E. S. Burroughs, Ema Schappert, G. W. Lightner, U. J. Groves, M. E. Seaton, J. R. Beasley, Mabel Beasley, S. V. Tobin, Nellie Tobin, O. H. Beasley, D. E. Nichols, Mary Nichols, Geo. Dahman, John T. McDaniel, Pearl McDaniel, L. B. Singleton, O. E. Burris, H. J. Dahman, Millie Schmoll, Geo. W. Davis, Essie B. Hodgson, S. N. Mills, S. J. Mills, W. C. Johnson, R. B. Bronough, Independence Hunting Club, by Saml. H. Woodson, Pres., Attest. H. A. Major, Secretary, Jessie L. Kerr, by Chas. C. Clasby with

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power of attorney, all costs and charges herein laid out and expended and that due process issue in this behalf."

Thereupon E. R. Clark, and thirty-seven others, averring that it is the bounden duty of respondents, as judges of the County Court of Cass County aforesaid, upon the showing by them made to make an order organizing the proposed drainage district as a body corporate, and that they are remediless in the premises by and through any ordinary process or proceeding at law, prayed our writ of mandamus commanding respondents to find in favor of making the improvements, and in favor of incorporating said proposed district as a body corporate. Upon filing the above petition we issued our alternative writ, to which as stated, respondents have duly demurred, and therefore this case is here for determination upon the law applicable to the facts averred in the alternative writ. To the law of the case then we will address ourselves.

The order of the county court, made by respondents as judges thereof, conclusively shows that the county court refused to organize the proposed drainage district,

Discretion as to Necessity. because it found "by the great preponderance of the evidence adduced that the proposed ditch, levee, and other improvements, are not necessary for sanitary or agricultural purposes, nor would they be *of public utility*, nor conducive to the public health, convenience or welfare, nor are they practicable." Thereupon, and for the reasons quoted, respondents dismissed the petition and proceedings at the cost of the petitioners therein.

Relators, as we understand their position, insist that the amendment of 1913 (Laws 1913, p. 272), by providing that "if the court finds that the owners of a majority in acreage of the proposed district are petitioners, or have joined in prayer of said petition for said ditch or improvement, by motion, then the court shall, or if less than a majority, the court in its discretion may find in favor of making the improvement," in a case which meets the conditions stated, has made it a mandatory and merely ministerial duty of the county court to order the

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incorporation of the district. Since, therefore, the petition presented to the county court in the case at bar contained the names of the owners of a majority of the acreage to be embraced in the proposed district, there was left in the county court no discretion whatever, and it became its mandatory duty to make the order. Stating their position thus relators earnestly insist that mandamus will lie, and that our alternative writ herein should be made peremptory.

Respondents contend, among other things urged, that the amendment of 1913 did not so change the statute as to take away from the county court all discretion and make of the duties incumbent merely ministerial acts; hence they urge mandamus will not lie. They also contend that if the statute does have the effect to shear the county court of all discretion to determine questions of public welfare, health, utility, convenience and sanitation, then the statute is unconstitutional. This, for the reasons, (a) that it permits private persons to determine these questions of public use for themselves, and through the resultant construction of ditches on and across, and by levying taxes against, the lands of non-consenting citizens, takes the property of the latter without due process of law, (b) and that such a taking lacking a judicial determination of public utility would constitute the taking of the private property of a citizen for a private use.

As we gather the trend of relators' argument, they do not contend that mandamus will lie, if the statute has left in the county court any discretion, or if there are left to be determined any questions of fact; but in such case they tacitly concede that it will not lie. If they do not concede this, the settled law which governs the issuance of the writ of mandamus concedes it for them. Bearing in mind that the county court did act, and did by the action it took refuse to organize the district upon the ground that the improvement prayed for did not involve matters of public use, and others involving a lack of public interests, which appears from the excerpt quoted from their order, we think there can be no doubt that if the court had any discretion left in it, and to be exercised

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by it before it made the order which it did make, mandamus will not lie. Mandamus in such case will lie to compel the taking of action, but it will not lie to dominate the nature of the action to be taken, nor to compel the taking of action contrary to that already taken. [State ex rel. v. Jones, 155 Mo. 570; State ex rel. v. Oliver, 116 Mo. 188; State ex rel. v. Board of Health, 103 Mo. 22.] This rule is well settled and is stated with much accuracy and more at length in a late work upon this subject, thus:

"It is a well recognized rule that where the performance of an official duty or act involves the exercise of judgment or discretion, the officer cannot ordinarily be controlled with respect to the particular action he will take in the matter; he can only be directed to act, leaving the matter as to what particular action he will take to his determination. Therefore, where an officer, in the exercise of a discretionary power, has considered and determined what his course of action is to be, he has exercised his discretion, and his action is not subject to review or control by mandamus." [18 R. C. L. 124.]

To this rule the only exception is that in some cases where discretion is involved and has been exercised, the law will yet afford relief by mandamus, when there has been a palpably arbitrary exercise of the discretion given in the very face of the law and of the conceded facts. [State ex inf. v. Talty, 166 Mo. 529; State ex rel. v. Harris, 176 S. W. 9; State ex rel. v. Adcock, 206 Mo. 550; 18 R. C. L. 126.] But for reasons which are fairly apparent, we do not think the facts here present bring this case within the exception noted. Which brings the argument back to a consideration of the amendment of 1913, and the effect of this amendment upon the duty to exercise discretion, with which the applicatory statutes concededly vested the county court before they were amended. This question is decisive of the case.

After a careful consideration of these statutes, and after construing them *in pari materia*, we are constrained to hold that they still make it the duty of the county court to exercise its discretion in any case and to make a finding (after hearing the evidence upon the question if

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necessary), whether the improvements prayed for are "necessary for sanitary or agricultural purposes, or would be of public utility or conducive to the public health, convenience or welfare." We reach this conclusion because (a) the amendment of 1913, itself, specifically says that if the county court shall find the above matters and things, it shall cause such finding to be entered upon the record of the court, and shall direct said viewers and engineers (Laws 1913, p. 272) to proceed to locate the improvements, make surveys, and make and file a schedule of the lands which will be benefited, damaged or condemned, etc., and because (b) any other construction, or the construction contended for by relators, would in our view inevitably render Section 5583, as amended by the Act of 1913 (Laws 1913, p. 272), unconstitutional and void. We discuss these propositions in their order.

Reading amended Section 5583, alone, and without reference to the context, or to the succeeding section of the same act, we would be forced to conclude that the Legislature intended to make mandatory a finding in favor of the incorporation of the district prayed for, in all cases wherein *the owners of a majority of the acreage* in the proposed district petitioned therefor. Such a view would render meaningless and wholly unnecessary the provisions of Section 5584, as amended (Laws 1913, p. 273), for, manifestly, if the county court is to be compelled to incorporate a drainage district in every case wherein a majority of the owners of the acreage ask for such incorporation, any consideration of whether the improvement is "necessary for sanitary or agricultural purposes, or would be of public utility or conducive to the public health, convenience or welfare," goes out of the case, and such finding (though the statute still says *it is a condition precedent to the making of further orders in the case*), is a wholly vain and futile thing. It seems impossible to reconcile these two sections with the view that the Legislature intended to take from the county court all discretion, and in effect vest in the owners of a bare majority of the acreage the right of passing upon

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these important questions of whether a public interest is involved, or a public use is to be subserved by the proposed improvement. Since it is not number of individual owners of tracts of land, but the *owner or owners of a majority of the acreage* in the proposed district, who are to be considered, it becomes possible (upon the view that the Legislature by the amendment ousted the county court of all discretion in the premises), for one single landowner to force the organization of a drainage district containing a five-mile ditch, and five or more such owners to force the organization of an improvement of any size or cost, over the protest of hundreds of other owners who together own but a bare minority of the acreage. At the same time such single owner would be, and under the view taken by relators, is in effect empowered to pass upon the question of whether the proposed improvement is necessary for sanitary or agricultural purposes, and whether it would be conducive to the public health, convenience or welfare. And such owner determines and forecloses these questions by his act of filing a petition and procuring thereon a mere preliminary and cursory report of the viewers and engineer. For automatically these findings follow the view urged on us by relators, without the necessity of taking evidence upon the question, and without the necessity of any court or other public body possessing judicial functions passing upon the matter.

This view that the Legislature must have intended to leave to the county court, and not to the owner or owners of a majority of the acreage, the discretion to determine the existence of the public use is also aided by the fact that amended Section 5583 (Laws 1913, p. 272), provides for the filing of remonstrances against the organization of the district, wherein the grievances of the remonstrators shall be set forth in writing. If it is mandatory upon the county court to organize every proposed district, and if they have no discretion otherwise, when one owner, or five or more owners of a majority of the acreage petition therefore, it is difficult to perceive what relevant matters could be urged by the remonstra-

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tors, which would be of any force and effect in preventing the organization of such district. Section 5592, Revised Statutes 1909, permits an owner of land to file exceptions to the report of the viewers, to have such exceptions heard, and if aggrieved by the judgment had thereon, to take an appeal upon the questions of (a) whether compensation has been allowed for property taken, (b) whether proper damages have been allowed for property "prejudicially affected," but nowhere is there any time or place left, if the contention of relators is correct, whereat any owner may successfully object or remonstrate against the organization of the district, for that the improvements proposed subserve none of the public uses mentioned in the statute and in our Constitution. By Amended Section 5583, supra, such owners may remonstrate upon the latter ground, and this is the only place provided in the statute for a remonstrance upon such a ground; but if the owner of a majority of the acreage asks for the formation of the district, the county court upon such a view would have no discretion to hear any objection, any remonstrance, or any evidence upon the contention that the improvement will subserve none of the public uses set forth in and declared to be requisites by the statute. Neither is the legality of the organization open to collateral attack. [State ex rel. v. Wilson, 216 Mo. 215; State ex rel. v. Blair, 245 Mo. 680; Barnes v. Construction Co., 257 Mo. 175.]

The above discussion demonstrates that if the construction of this amendment urged on us by relators, be the proper one, then the amendment is unconstitutional. But it is contended by relators that respondents are Constitutionality. not in a position to raise this question of the unconstitutionality of the amendment of 1913, because they are merely officers, and because they are not themselves personally affected. This is a much mooted and disputed question, and the law seems presently to lean to the view of the relators. [State ex rel. v. Williams, 232 Mo. 56.] But we need not pass and do not pass upon this precise question. For this is not accurately the situation presented. Here we have a section

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of the statute, which, by reason of its own language, as well as by reason of conflicting language in both the section preceding and the section following it, is ambiguous. In construing it we are asked to take one view of its meaning, which renders it obviously unconstitutional, and to take another view which saves it from unconstitutionality. This we may do, whether respondents have the right to raise the question of constitutional invalidity or not. We do not pass upon its constitutionality; we simply construe it, and as an aid to that construction, say that if it means what relators contend it means it is unconstitutional. For upon such a view it permits the taking of private property for private use, which is prohibited by the Constitution. [Sec. 20, art. 2, Constitution 1875.] Neither does the procedure provided serve to bring such a taking within the exception here pertinent; that private property may be taken "for agricultural and sanitary purposes." This for the reason that the question whether the use intended to be made of private property, is a public one, is not one to be determined by the Legislature, but is solemnly declared by the organic law to "be a judicial question, and as such judicially determined." [Sec. 20, art. 2, supra.] This question of a public interest, or a public use, must of necessity then be relegated for its determination to some court possessing for the nonce at least the power of judicially determining it, and by its order adjudging it. Under the Constitution this determination of a public use *vel non* cannot be left to the viewers and an engineer; certainly not to these persons when no notice, and no day in court is afforded to those whose property is injuriously affected or taken by the viewers and engineer's report. Neither, we apprehend, ought the one single owner, or the five owners of a majority of the acreage in the proposed district, be permitted to determine this question of a public use for themselves, by the mere act of filing a petition and a bond.

Without doubt the Legislature has the right to declare by a general statute that the drainage of lands for sanitary or agricultural purposes is an act of public utility, that it constitutes a public use. For the Con-

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stitution in express terms declares such uses to be public and not private uses. [Sec. 20, art. 2, Constitution 1875.] But the determination of this question in any given instance is necessarily to be relegated to a judicial determination. There is always left to be judicially determined the question whether any particular improvement proposed will inure to the public health or welfare; in short, whether it connotes in the instance at hand a public use of the private property proposed to be taken. In the view of the amendment taken by relators, no provision exists for such determination, and the statute would be void. Since we are enjoined by the ruled cases to so construe an ambiguous or doubtful statute as to preserve if possible its constitutionality (*Kenefick v. St. Louis*, 127 Mo. 1; *Dorrance v. Dorrance*, 242 Mo. 625), it is manifest that we can not do this and follow that construction of this amended statute, for which relators contend.

We conclude that as the amended statutes under discussion (Laws 1913, pp. 272 and 273) do not, when construed *in pari materia* and in the light of the Constitution, so change the law as to oust the county courts of all discretion in passing upon the question of whether there is a public use involved, mandamus will not lie to compel the county court to act in any particular way. Since, therefore, respondents have already exercised their discretion and have already passed upon this matter, our writ herein was improvidently granted, and it ought to be quashed. Let this be done.

Graves, C. J., Bond, Walker, Blair and Williams, JJ., concur; Woodson, J., dubitante.

VIOLET BOGY MOSELEY v. BERNARD P. BOGY
et al; BERNARD P. BOGY, Appellant.

In Banc, December 1, 1917.

1. **COURTESY: In Property Devised by Will.** If the wife's will gives an undivided half interest in fee simple in her property to her husband, and the other undivided half interest to their children in fee simple, the husband is put to his election as to whether he

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will claim under the will or claim his courtesy devolved upon him by operation of law. The two claims are inconsistent, and he cannot have a half in fee simple, and a courtesy in the other half. *Held*, by WILLIAMS, J., dissenting, that the intention to exclude the husband from his legal right to courtesy must be clearly expressed; if it is doubtful, he is not excluded.

2. **WILL: Devise to Husband: Fee Simple Exclusive of Courtesy.** The first clause of the will read: "Should I die leaving surviving me my husband and a child or children, then it is my will that my whole estate, real and personal, be divided between my husband and children, in the proportion of one-half to my husband and one-half to my child or children." The third clause read: "Should I die leaving surviving me neither husband nor children, then and in such event I give, devise and bequeath my whole estate, both real and personal, to my mother, Anne E. Griffith." *Held*, that testatrix's intention was to devise to her husband a half interest in fee simple in her entire property, and a half interest in fee simple to her children, and not to devise the real estate subject to the husband's courtesy, even though the will by its terms does not attempt to dispose of his courtesy. The word "estate" did not mean the interest she had in the property, but meant the property itself; and that view is enforced by the third clause, which uses the same words to describe the property and gives her "whole estate, real and personal" to her mother, in case neither husband nor children survived her, it being clear that she intended to give a vendible fee simple title to her mother in such event.

Held (by GRAVES, C. J., concurring) that the same view is further enforced by the second clause of the will by which testatrix declared that in case of her death leaving her husband surviving, but no child or children, her "whole estate, real and personal" is given in equal parts to her husband and mother, thereby making it clear that she did not intend to make the real estate given to her mother subject to the husband's lifetime enjoyment.

Held, by WILLIAMS, J., dissenting, that the husband had an estate or interest in the lands at the time the will was made, and the will by its very terms includes everything that was hers and excludes everything else; and there being no clearly expressed intention to exclude the husband's courtesy, he was not put to his election, but was entitled to hold both his estate by the courtesy and the half interest in the remainder devised to him by the will.

3. ——: **Election: By Putting Will Into Effect.** The husband, to whom his wife's will gave one half her property in fee simple, by presenting the will to the probate court and making the usual affidavit, by applying for letters testamentary and qualifying as executor, by filing an inventory of the estate and swearing to same,

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in which he set forth the real estate and listed no personal property, by his final settlement reporting that there was no personal property for distribution and being discharged, by receiving a benefit under the will which gave to him a vendible fee simple title to one half of testatrix's property, and by thus deliberately putting the will into effect with full knowledge of his rights under it and of all the property affected by its provisions, elected to take under the will, and cannot now elect to renounce it and take his courtesy in the entire estate.

Held, by GRAVES, C. J., concurring, that a letter addressed to his daughter's lawyer in which he stated that at the time the will was probated he was informed by the court that he had "a fee simple in one half and a courtesy in the other half, as there were no conditions attached to the acceptance of the one half left me absolutely," further shows that he was claiming under the will, one half the estate in fee simple and the other half for life, and manifested his election to take under the will.

Held, by WILLIAMS, J., dissenting, (1) that the act of the husband in presenting the will for probate and acting as executor thereunder does not, in itself, constitute an election to claim under the will, and the fact that he was informed by the probate court when he presented the will for probate that he was entitled to one-half the estate in fee simple and to courtesy in the other half nullifies any inference of an election that may be otherwise drawn from qualifying as executor under the will; (2) that the fact that he claimed both courtesy and under the will does not of itself amount to an election to take under the will and relinquish his courtesy; and (3) that if the facts show an election they show an election to take the courtesy and not under the will, since he never received any property under the will, and there was no personality, there has been no change in the ownership or possession of any of the realty since testatrix's death, and he has claimed to be collecting the rents by right of his courtesy.

Appeal from St. Louis City Circuit Court.—*Hon. Rhodes E. Cave, Judge.*

AFFIRMED.

S. T. G. Smith for appellant.

(1) A married woman cannot by will dispose of her real property except subject to the rights of the husband to his courtesy therein. Sec. 536, R. S. 1909. (2) Where

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a man and woman are married and issue capable of inheriting is born of said marriage, the husband, by operation of law, immediately becomes vested of a freehold estate in all real property of which the wife was seized at the time of her death. *Myers v. Hansbrough*, 202 Mo. 495; *Donovan v. Griffith*, 215 Mo. 149; *Kennedy v. Koopman*, 166 Mo. 87; *Fitzgerald v. Brennan*, 57 Conn. 743; *Foster v. Marshall*, 22 N. H. 491; *In re Folwell's Estate*, 59 Atl. (N. J.) 467. (3) A provision in a will of a wife in favor of her husband will never be presumed to be in lieu of courtesy unless such a design is unequivocally expressed. *Bryant v. Buford*, 49 Mo. 546; *Hasenritter v. Hasenritter*, 77 Mo. 162; *Richardson v. DeGiverville*, 107 Mo. 422; *Burnley v. Thomas*, 63 Mo. 392; *Pemberton v. Pemberton*, 29 Mo. 408; 1 *Jarman on Wills* (6 Ed.), p. 547. (4) Where a testatrix owns a partial interest in real estate and devises the "whole of my estate," all that passes by her will is that part of the fee simple which is left in the testatrix by the law after the courtesy right of the husband has been cut out of the fee simple, and such a devise does not convey, or attempt to convey, the courtesy right of the husband. *Myers v. Hansbrough*, 202 Mo. 495; *Donovan v. Griffith*, 215 Mo. 149; *Pratt v. Douglas*, 38 N. J. Eq. 510; *Penn v. Guggenheim*, 76 Va. 839. (5) Where a testatrix has only a partial interest in real estate and in her will employs general words in disposing of same, such as "my whole estate," "all my lands," "all my estate," no case of election arises which requires a devisee holding a part of the property to elect whether he will take under the will or keep what he already has. *Keas v. Gross*, 92 Mo. 647; *Penn v. Guggenheim*, 76 Va. 839; *Tony v. Spragins*, 80 Ala. 541; *Charch v. Charch*, 57 Ohio St. 561; *Pratt v. Douglas*, 38 N. J. Eq. 510; 1 *Pomeroy on Eq. Jur.*, sec. 473. (6) The word "my" in a will used to describe property disposed of is expressive of restriction to the extent of the interest of the testator only. *Sauvage v. Wanhop*, 143 S. W. (Tex.) 259; *Emery v. Haven*, 67 N. H. 505; *Estate of Mumford*, 1 *Myrick Prob. R.* 134; *Thomas v. Blair*, 111 La. Ann. 683. (7) If the

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court should find that this case is a case for an election, it appearing that the appellant Bernard P. Bogy has never exercised his right of election, then he is still entitled to elect as to which he will take, his courtesy right, or the half given by the will of his wife, Eleanor M. Bogy. *Pratt v. Douglas*, 38 N. J. Eq. 510; *Shuster v. Morton*, 187 S. W. (Mo.) 2; *Stone v. Cook*, 179 Mo. 534.

Arthur G. Moseley and W. W. Herron for respondent.

(1) The action for partition in this case should be sustained, although it might be held that the defendant has title by courtesy. R. S. 1909, sec. 2559; *Atkinson v. Brady*, 114 Mo. 202. (2) The rules of law with reference to courtesy and dower are closely analogous in this State, and a construction placed upon the rights of the party in the one instance will, when it can be done, be placed upon the rights of the party in the other. R. S. 1909, secs. 120, 360, 361, 535, 536; *Teckenbrock v. McLaughlin*, 246 Mo. 717; *Moore v. Hurd*, 76 Kan. 826; *Everett v. Kresky*, 92 Iowa, 333. (3) Estates given by will are always regarded as vesting immediately unless the testator has clearly manifested an intention that they should be contingent upon a future event. *Schofield v. Allcott*, 120 Ill. 374. An intervening life estate in one of the donees was not contemplated by the testatrix making this will, and consequently not intended by her; an intervening life estate would delay the enjoyment of the provisions made in the will for the benefit of the three donees and cannot but be antagonistic to the provisions of the will and the intention of the testatrix as shown thereby. (4) Where the surviving husband who otherwise would be entitled to a courtesy in the lands of his deceased wife is left a part of her lands in the will, he is obliged under the law to elect whether or not he will take under the will or under the law, for he cannot take under both. *Casler v. Gray*, 159 Mo. 595; *Young v. Boardman*, 79 Mo. 186; *Stone v. Cook*, 179 Mo. 534, 64 L. R. A. 287; *Fox v. Windes*, 127 Mo. 511, 48 Am. St. 648; *1 Woerner, Am. Law of Adm.* (2 Ed.), p. 500; *Wood v. Trust Co.*, 265 Mo. 511; *Schuster*

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v. Morton, 187 S. W. (Mo.) 2; Clark v. Clark, 132 Ind. 25; Robertson v. Schard, 142 Iowa, 500; Clark's Appeal, 79 Pa. St. 377; McBride's Estate, 81 Pa. St. 305; Severson v. Severson, 68 Ohio, 656; Aschenford v. Chapman, 81 Kan. 312; Pearson v. Darrington, 32 Ala. 240; Allen v. Boomer, 82 Wis. 371; McReynolds v. Jones, 30 Ala. 101. (5) The will must be accepted as a whole. The donee cannot accept the part that is in his favor and reject the portion that may be against him. Wood v. Trust Co., 265 Mo. 211; Stoeckler v. Silberberg, 220 Mo. 270; Davidson v. Davis, 86 Mo. 444; O'Brien v. Ash, 169 Mo. 300; Cunningham v. Cunningham, 30 W. Va. 604; Stone v. Cook, 179 Mo. 534; Ditch v. Sennott, 117 Ill. 367. (6) The appellant by his acts in probating the will, qualifying under it as executor, as well as by other conduct with reference thereto, elected to take under the will, and now cannot relinquish. Davidson v. Davis, 86 Mo. 440; Allen v. Allen, 124 N. C. 334; Allen v. Boomer, 82 Wis. 372; Smith v. Wells, 134 Mass. 11; Mitchell v. Vest, 136 N. W. (Iowa) 1055; Craig v. Conover, 80 Iowa, 358; In re Frank's Estate, 66 N. W. 919; Appeal of Coe, 64 Conn. 352; In re Melot's Estate, 231 Pa. 520; Hyde v. Baldwin, 17 Pick. (Miss.) 307; Weeks v. Patten, 18 Me. 47; Martin v. Battey, 87 Kan. 582; Hoggard v. Jordan, 14 N. C. 610; 6 Am. & Eng. Ann. Cas. 634; Schuster v. Morton, 187 S. W. (Mo.) 2. (7) Under the Married Woman's Act a husband has no vested estate in his wife's separate property during her life. Evans v. Loddale, 6 Houst. (Del.) 215. (8) In the construction of a will the intention of the testator must prevail unless it is contrary to some rule of law. Borland on Wills, p. 296; Burnet v. Burnet, 244 Mo. 497. (9) The estate by courtesy is derived by the husband through his wife and contemplates a continuation of the estates of the wife in the husband during his life and makes no break in the succession, whereas title by will is an alienation and constitutes a passing of the title. 1 Washburn on Real Property, p. 159; Hayes v. Barrniger, 169 Fed. 224.

WHITE, C.—The plaintiff sued in ejectment for a one-fourth interest in certain real estate in the city

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of St. Louis, and in a second count of the petition demanded partition of the same alleging that the plaintiff was entitled to an undivided one-fourth interest in fee simple in the premises; the defendant Bernard P. Bogy to an undivided one-half interest, and the defendant Bernard P. Bogy, Jr., to an undivided one-fourth interest. Plaintiff is the daughter, and defendant Bernard P. Bogy, Jr., is the son, of Eleanor M. Bogy, deceased, and defendant Bernard P. Bogy is the surviving husband of Eleanor M., and the father of Violet and Bernard P., Jr. Plaintiff claims under the will of her mother who died June 10, 1904. Defendant Bernard P. Bogy in his separate answer asserts his right to possession of the property in dispute, by virtue of his courtesy.

The plaintiff in reply set up the will of Eleanor M. Bogy, alleged that Bernard P. Bogy accepted its provisions, and elected to take under it, and further alleged that by such acts he was estopped to claim any interest in the real estate contrary to its provisions. The first clause of the will is as follows:

“First. Should I die leaving surviving me my husband and a child or children, then it is my will that my whole estate, real and personal, be divided between my husband and children, in the proportion of one half to my husband and one half to my child or children.”

The third clause is as follows:

“Third. Should I die leaving surviving me neither husband nor children, then and in such event I give, devise and bequeath my whole estate, both real and personal, to my mother Ann E. Griffith.”

The fourth clause appoints Bernard P. Bogy executor and requests that he may serve without bond. The judgment of the circuit court was in accordance with the prayer of the petition.

I. If it was the intention of the testatrix by the first clause of the will to give her husband an undivided

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one-half interest in fee simple in the premises and to her children an undivided half interest
Taking Under Will and Courtesy Besides. in fee simple, and that intention clearly appears, then Bernard P. Bogy was put to his election as to whether he would claim under the will or claim his courtesy devolved upon him by operation of law. The two claims are inconsistent. The children could not have their fee simple interest if his courtesy should be carved out leaving them only a remainder, and he would not have a vendible, fee-simple, half interest in the property if he simply held his life estate in the whole.

The principle applicable here has been considered and discussed in all its important phases in recent adjudications of this court. The rule announced by this court may be stated thus: Where a testator by will attempts to dispose of property which the will cannot affect because by operation of the law it devolves upon another, and at the same time makes provision for such other out of property which the testator may devise, the other cannot accept the provision of the will without allowing his property to go as the will directs. [Stoepler v. Silberberg, 220 Mo. 258, l. c. 270; Wood v. Trust Co., 265 Mo. l. c. 525, and cases there cited; Lindsley v. Patterson, 177 S. W. l. c. 832; Schuster v. Morton, 187 S. W. 2.] All those cases, under varying circumstances and construing different statutes, announce the principle in similar general terms.

II. It is claimed by appellant that the will by its terms does not attempt to dispose of the courtesy of Bernard P. Bogy, and therefore he is not put to his election. Appellant contends with much subtlety and plausibility that the use of the expression "my whole estate, real and personal," could not include the estate and interest of the surviving husband; and further that the testatrix under the terms of the will as a whole, and the circumstances surrounding, could not have intended to pass any estate except that which lawfully she might devise, and therefore the effect of the will was merely

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to dispose of the remainder after the termination of the husband's life estate, giving the plaintiff an undivided one-fourth in that remainder.

The term "estate" as used in instruments of this character does not necessarily mean the interest which one may have in certain property; it also has a popular significance, a general significance, to which the courts sometimes give effect. When applied to real estate the word is sometimes construed to mean the testator's specific lands and not the quantity of interest he may have in them. [Godfrey v. Humphrey, 29 Am. Dec. 621, 18 Pick. 537.] "The word estate . . . may be used to express either the quantity of interest devised or to designate the thing devised." [Hart v. White, 26 Vt. l. c. 267; Hudson v. Wadsworth, 8 Conn. 348, l. c. 358.] The word "estate" taken in this primary sense as used in a will has been held to be synonymous with the word "property." [Foil v. Newsome, 50 S. E. (N. C.) l. c. 598.] According to some of the dictionary definitions it may mean "fortune," "possessions." So it does not necessarily follow that because the testatrix speaks of her "estate" the word must be given its restrictive meaning which would include only her specific interest in the property. It is probable that when she used the expression "my whole estate, real and personal," it was equivalent to saying "all my real estate and personal property." Therefore, we may gather from the instrument, in the light of surrounding circumstances, what was the *intention* of the testatrix. Having ascertained that intention the solution of the question is at hand. [Burnet v. Burnet, 244 Mo. l. c. 497.]

Appellant argues that the husband's courtesy is a life estate vested on the death of his wife by force of the common law, and she could not have had in contemplation to dispose of it, as might be the case if she had specifically described the property instead of mentioning her estate. It should be noticed that the terms used in the statutes and in rules laid down in decisions defining and describing the courtesy of the husband at common law

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always mention it as an interest in *his wife's land*. He acquires his right to the courtesy by virtue of it being "her land." The statute (Sec. 536, R. S. 1909), empowering a married woman to devise land by will, mentions it as "her land," and provides that such devise shall be subject to the rights of the husband to his courtesy. In all those instances "her land" is spoken of as designating the property which is under consideration and not her specific interest in it. The Married Woman's Act of 1889 applied to this property because the marriage took place in 1890. The husband's common-law courtesy was a mere life estate, contingent on his outliving her. The wife had entire control and management of her real estate, and enjoyment of the usufruct free from her husband's control. She could convey it without his joining in the deed and pass a fee simple title, subject only to the contingency that he might outlive her and claim his courtesy in it. [Farmers Exchange Bank v. Hageluken, 165 Mo. 443; Kirkpatrick v. Pease, 202 Mo. l. c. 490.] Very naturally she would call it "my real estate," and when she mentioned her "estate real and personal" in the will, she intended the words to have the same force as such words have when used in the statutes, and desired them to be as inclusive as if she had used a specific designation and description of the property to be affected.

Furthermore, the third clause of the will provides that if her husband and children do not survive her, her "whole estate, both real and personal," shall go to her mother. Of course, it cannot be questioned that the third clause, if the conditions were such that it would apply, would pass the fee simple estate. There is no reason to suppose that by the use of those words in one clause of the will she meant to devise merely a remainder and in another clause she meant by the same words to pass the entire estate. Nor is it likely that she intended to pass a larger interest in the personal property than in the real estate when using the words, "my whole estate, real and personal." And, when she expressed her desire in the will by saying, "it is my will that my

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whole estate, real and personal, be divided between my husband and my children in the proportion of *one-half to my husband and one-half to my child or children*," it is highly improbable that she thereby intended a higher and larger interest in the specific property should be vested in her husband than in her children. It would be unusual if she intended to restrict her children each to an undivided one-fourth interest in remainder in the property when the law gave them the entire remainder. It is apparent that her purpose in making the will was to make some provision for the children in addition to what the law gave them, a provision which would go into immediate effect for their benefit.

III. It is asserted, however, that even if the husband is put to a election he has not elected and may yet do so. It is true that an election being a choice ~~Election.~~ between two alternatives, there would be none if the appellant merely claimed both under the will and his right by courtesy. [Cobb v. Macfarland, 87 Neb. l. c. 411; Whitridge & Alexander v. Parkhurst, 20 Md. l. c. 70-1.] It is also a rule that when one is put to an election between two inconsistent courses and he first adopts one by some unequivocal act, that is an election which he cannot afterwards recall. [Stone v. Cook, 179 Mo. 534; Carper v. Crowl, 149 Ill. l. c. 480.] The appellant in this case now claims both his courtesy in the property and an undivided half interest in remainder under the will. Eleanor M. Bogy died in 1904 and the defendant Bernard P. Bogy, after her death, continued in possession of the real estate. That act was consistent with either a claim of courtesy or a claim under the will, because by the terms of the will he was tenant in common with his children who were minors living with him at the time. [Hynds v. Hynds, 253 Mo. l. c. 33; Boothe v. Cheek, 253 Mo. l. c. 130; Stevens v. Martin, 168 Mo. 407, l. c. 412; Seibert v. Hope, 221 Mo. l. c. 635; Rodney v. McLaughlin, 97 Mo. l. c. 431.] At that time he performed no unequivocal act indicating an intention to claim his courtesy, but he did certain things which unequivocally indicated an intention

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to claim under the will. The will was in his possession at the time of his wife's death. He presented it for probate to the probate court, making the usual affidavit. He applied for letters testamentary, making affidavit that he would "faithfully execute the last will of the testatrix." He filed and swore to an inventory of the estate. This inventory sets forth the real estate here in dispute and lists no personal property. He filed his final settlement reporting there was no personal property for disbursement and was discharged.

The authorities are conflicting as to whether or not the mere qualifying and acting as executor is an election to take under the will. In California such acts are held insufficient to show election (*In re Gwin*, 77 Cal. 313; *Estate of Frey*, 52 Cal. 658); but in North Carolina the contrary is the rule (*Mendenhall v. Mendenhall*, 53 N. C. 287; *Syme v. Badger*, 92 N. C. 706). Many cases occur where such acts are noted as indicating an intention to elect, but are associated with other facts such as accepting a bequest. [*Davidson v. Davis*, 86 Mo. l. c. 444.] Many cases, cited in the text-books as holding that acting as executor is not an election, show facts which qualify the act: for instance, the case of *Whitridge & Alexander v. Parkhurst*, 20 Md. 62, where the executrix was claiming both under the will of her mother, of which she was executrix, and also under the earlier and conflicting will of her father; the case of *Tyler v. Wheeler*, 160 Mass. 206, where it was held the husband did not elect by qualifying as executor, because the will gave him nothing; the case of *Kerrigan v. Conelly*, 46 Atl. (N. J.) 227, where the surviving husband qualified as administrator with the will annexed, and he could carry out some provisions of the will which were not inconsistent with his claim under the law; the case of *Reaves v. Garrett's Admr.*, 34 Ala. 558, where the executrix qualified in ignorance of her rights; the case of *Pace v. Pace*, 271 Ill. 114, and *In re Proctor's Estate*, 103 Iowa, 232, where the acts done as executor were not inconsistent with the claim under the law.

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Often it has been held that any act or declaration of the widow plainly indicating a purpose to take under the will, or recognizing the force of the will, constitutes an election. [Craig v. Conover, 80 Iowa, l. c. 358; Melot's Estate, 231 Pa. 520. See also Appeal of Scholl, 17 Atl. (Pa.) 206.] Where a widow filed a petition asking the court to carry the will into effect, she was held by that act to have elected. [Ashlock v. Ashlock, 52 Iowa, l. c. 322.] She could not afterwards reconsider the election so made, for the Supreme Court of Iowa in deciding the case said: "The moment she made such election, it appears to us that her relation to the estate, as well as that of the other devisees, became fixed." [See also Mitchell v. Vest, 136 N. W. (Iowa) 1054; Robertson v. Schard, 142 Iowa, 500.]

In this case the acts of Bernard P. Bogy in proving the will and qualifying under it, are inconsistent with any theory except an election to take under it. The absence of personal property emphasized the character of his acts. He could not say that he might execute the will in any particular and leave the real estate intact. The only property to be affected by it, as he must have known when he proved it, was the real estate now in dispute. His only reason for probating it and qualifying as executor was to carry out its provisions relating to the real estate. He received a benefit under it, because he acquired the vendible fee simple title to the half interest which it gave him. He had full knowledge of his rights. He knew what the law would give him independent of the will, and he knew what the will would give him. He knew all the property affected by the provisions of the will. Having that knowledge he deliberately chose to put the will into effect, declaring that he would execute its provisions; therefore he elected to take under it.

The judgment is affirmed.

Roy, C., dissents.

PER CURIAM:—The foregoing opinion of WHITE, C., is adopted as the opinion of Court in Banc. *Bond* and

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Walker, JJ., concur; *Graves, C. J.*, *Faris* and *Woodson, JJ.*, concur in separate opinion by *Graves, C. J.*; *Blair, J.*, dissents; *Williams, J.*, dissents, and adopts the opinion of *Roy, C.*, as his dissenting opinion.

GRAVES, C. J. (concurring)—In this case I concur in the opinion of WHITE, C., upon all of the questions therein considered. When this whole will is read (from its four corners, as we must, to get intent) there can be no question as to what the testatrix meant by the first clause of that instrument. She uses the terms “my whole estate, real and personal.” In the second clause she uses the same terms. In this second clause of the will she eliminates her prospective children (for she had no children when the will was made) and divides the property between her husband and her mother. It would be giving language a strained construction to say that, by this second clause, she meant that her mother should only take a remainder in one-half of the realty. She intended to provide substantially for her mother immediately upon her death. A mere remainder would not do this. To my mind nothing is clearer than that this testatrix under the second clause in the will had reference to a fee simple estate in all her lands, and that her husband and her mother should each have an undivided half interest therein in fee. Her mother’s age would preclude from her mind the idea of forcing her to run a race of life with her husband to see whether or not the mother would receive a substantial heritage by the will. When the testatrix subscribed to this will (in my humble judgment) she had no other thought than to give her mother and her husband their respective interests in fee simple.

A consideration of this second clause throws much light upon the first clause, because the same words are used. If she used the words “my whole estate, real and personal” in the sense of a fee simple interest therein in the second clause of the will, she evidently used them in the first clause. But this is not all. When we reach the third clause of the will we find the same words, i. e. “my whole estate, both real and personal.” In that clause she is providing for the disposition of her estate in the

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event she had neither husband nor children at her death. She was giving a fee simple to the mother, and yet uses the same identical language. Reading the whole will, as we must, it is clear that the terms "my whole estate, both real and personal" were used throughout the whole instrument in the sense of a fee simple estate. She therefore intended by the first clause to give to her husband one half of the real estate in fee simple, and the other half in fee simple was to go to her children. If then the husband desired to hold the life estate given him by the law, he was placed upon his election.

The next question is, has he elected? The facts of the case shows that he did. His letter to Judge Moseley of date November 18, 1912, speaks louder than his acts. This letter evinces the fact that he counseled with the probate judge, when he went in to administer upon this estate; that he was advised that the will gave him one half of the estate in fee simple and the other half for life; he proved the will and administered the estate on that theory; lawyers later advised him to the same effect. In fact, this letter shows that he was claiming one half the estate in fee simple and the other half for life. This kind of claim could only be based on the will. Under the law (without the will) he had only a life estate. Whenever he claimed more than a life estate, he was claiming under the will and not under the law, and against the will. That he did make this claim of a fee simple title is shown by his letter. That letter reads: "Now, as to V.'s rights. At the time the will was probated I was informed by the court that I had a *fee in one half* and a *curtesy in the other half*, as there were no conditions attached to the acceptance of the *one half left me absolutely*. Since V.'s marriage I have consulted several lawyers, and they have all agreed to the above." The italics are ours. That the husband from the time of probating this will to the time of writing this letter was claiming a fee in one half this real estate there can be no question, and if he was, he was claiming it under the will and not otherwise. He has therefore elected to take under the will. That the construction given by this court of this will may differ from his views of the meaning of the will, or the advice

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he received as to its meaning, cannot wipe out the fact that the husband did elect to take under the will. His views of the will were erroneous, and he may have lost in the transaction, but that he elected to take under the will because he thought (under his construction) that he was getting one half of the property absolutely, is clear. For these reasons, as well as for the reasons stated in the opinion, I concur fully in the opinion by WHITE, C.

ROY, C. (Adopted by WILLIAMS, J., dissenting)—Plaintiff's petition is in two counts, the first being in ejectment for an undivided fourth of certain real estate in the city of St. Louis, and the second for the partition of the same property. There was judgment for the plaintiff in accordance with her petition, and the defendant Bernard P. Bogy has appealed.

The defendant Bernard P. Bogy and Eleanor M. Griffith were married February 5, 1890. There were born of that marriage two children, the plaintiff who was born January 15, 1891, and defendant Bernard P. Bogy, Jr., who was born November 12, 1894. During her lifetime the wife was seized in fee simple of the property in controversy, which was and still is tenement property and under lease to various tenants. Up to the time of her death the rents were paid to the wife. She died June 10, 1904. She left a will which was presented for probate by the surviving husband and was admitted to probate by the probate court of said city on June 14, 1904.

The material parts of that will are as follows:

"First. Should I die leaving surviving me my husband and a child or children, then it is my will that my whole estate, real and personal, be divided between my husband and children, in the proportion of one-half to my husband and one-half to my child or children.

"Second. Should I die leaving surviving me my husband, but no child or children, then it is my will that my whole estate, real and personal, be equally divided between my husband and my mother, Ann E. Griffith, one-half to each.

"Third. Should I die leaving surviving me neither husband nor children, then and in such event I give,

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devise and bequeath my whole estate, both real and personal, to my mother, Ann E. Griffith.

"Fourth. I hereby appoint my husband, Bernard P. Bogy, my executor and request that he be not required to give bond."

The executor therein named thereupon qualified as such, and filed an inventory of the property of the estate, showing the property in controversy and no other. There was no personal property of the estate. In due time the executor filed his final settlement of such estate, showing that he had received nothing, and had paid out nothing as such executor.

Immediately upon the death of the wife the husband began collecting the rents of the property, amounting to about \$1200 a year. He did not account for any portion of the rents to his children.

This suit was begun February 24, 1914. Bernard P. Bogy, Jr., was made defendant and appeared by the defendant Bernard P. Bogy as his guardian *ad litem*.

The first count of the petition contains the following:

"That defendants thereafter, on, to-wit, the twentieth day of June, 1904, entered into and upon such premises and have since said entry and do now unlawfully withhold from plaintiff the possession of said premises, to her damage in the sum of one hundred thousand dollars; that plaintiff was upon the said tenth day of June, 1904, and has been ever since said date legally entitled to the possession of said premises."

The answer of defendant Bernard P. Bogy states that he is the owner of an estate by the courtesy in all said real estate, and that he is entitled under said will to one-half of the remainder in fee, and that each of the other parties is entitled to a fourth of the remainder in fee under said will.

The reply alleges that such will disposed of the entire property in fee, giving to the father a half and to each of the children a fourth. It contains the following:

"That the said Bernard P. Bogy, defendant, accepted the devise so made to him in said will, and elected to take and enjoy the same, and now claims, and has claimed ever since the probating of said will, to be

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the owner in fee-simple of an undivided one-half interest in and to the real estate described in the petition, under and by virtue of the provisions of said will.

"That neither the plaintiff nor either of the defendants have or claim any other source of title to said real estate than by, through and under said Eleanor Bogy and by, through and under said will; and that the said Eleanor Bogy, deceased, is the common source of title.

"That said defendant Bernard P. Bogy elected to accept the devise made to him in said will, and is estopped thereby to claim, assert or set up any right, title and interest in and to said real estate, or any part thereof, contrary to the provisions of said will or by reason of courtesy of the laws of this State, for that the claim of estate by courtesy in said land is antagonistic to the dispositions made in said will; and that the said Bernard P. Bogy, defendant, waived his right to claim title by courtesy to said real estate by reason of his assent to said will and his claim under the provisions thereof, as aforesaid, and by reason of his acceptance of the provisions of said will, as aforesaid, made in his favor, and his acceptance of the trust thereby created as executor and the probating thereof, for that plaintiff says that the assent to said will on the part of the said Bernard P. Bogy and acceptance by him of the fee-simple estate devised to him in said will are antagonistic to the claim now made by him of an estate by courtesy therein, and this she is ready to verify."

On the trial the plaintiff introduced in evidence a letter written by the defendant Bernard P. Bogy to Judge Moseley, plaintiff's attorney, dated November 18, 1912. It contained the following:

"Now, as to V.'s rights. At the time the will was probated I was informed by the court that I had a fee in one half and a courtesy in the other half, as there were no conditions attached to the acceptance of the one-half left me absolutely. Since V.'s marriage I have consulted several lawyers, and they have all agreed to the above."

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It is agreed that "V." mentioned in that letter is the plaintiff.

I. In Myers v. Hansbrough, 202 Mo. 495, VALLIANT, P. J., said:

"The particular title by which the plaintiff claims right to the possession of this land was never in his wife, it is an interest cut out of her title, subtracted from it, not by her leave or license, but by the arbitrary force of the law. It is an interest that could not be taken from the husband either at the will or sufferance of the wife.

Wife's Estate Devised.
If a creditor of hers, after the estate by the courtesy initiate had vested in the husband, had obtained judgment against her and sold the land in her lifetime, the purchaser at the sheriff's sale would have obtained what was hers, which, under the statute, included possession during her life, but the creditor would not by such sale acquire what was not hers, what was beyond the reach of her will or sufferance."

That case has been cited with approval in Donovan v. Griffith, 215 Mo. l. c. 162, and in Teckenbrock v. McLaughlin, 246 Mo. 711.

Mrs. Bogy owned an estate or interest in this land, but she did not have the entire ownership of it. The husband also had an estate or interest in it. Her will does not purport to dispose of any particular item of property, real or personal. It does not attempt to dispose of "my land." It disposes of "my whole estate, real and personal," no more, no less. By its very terms it includes everything that was hers and excludes everything else. The language used seems specially and peculiarly adapted to the purpose of leaving the husband's courtesy estate unaffected by it.

If the wife entertained any intention of disposing of the entire ownership of the land including the husband's courtesy estate, she did not express such intention in the language of the will. We find no authority anywhere holding that the words "my estate" can be construed to include the estate of others ~~in~~ land not otherwise particularly described.

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Godfrey v. Humphrey, 18 Pick. (35 Mass.) 539, is cited as upholding the contrary view. In that case the testator owned the land in fee, and the only question was whether the devise of his "estate" to the wife, without words of explanation, carried the fee or only an estate for the life of the wife. The question at issue here was not there involved. But the court in that case said:

"It has long been held, that the devise of all a man's estate, where there are not words to control or restrain its operation, shall be construed not merely to mean his lands, but the quantity of interest which he has in them, so as to pass an estate of inheritance, if he has one. [Carter v. Horner, 4 Mod. 89, 1 Eq. Cas. Abr. 177.]"

Certainly it will be construed "to pass an estate of inheritance *if he has one.*"

In Graham v. Roseburgh, 47 Mo. 111, l. c. 114, it was said:

"The principle of election is frequently applied by courts of equity in cases of wills, and rests upon the obligation imposed on a party to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person from whom he derives one, that he should not enjoy both."

Note that the intention must be "clear."

In Schorr v. Etling, 124 Mo. 42, it was claimed that a devise to a wife was in exclusion of her homestead estate. It was said:

"The intent to exclude the widow from her legal right must clearly appear; if it be doubtful, she is not to be excluded."

In our opinion this is not a case in which the surviving husband was put to his election, and that he is entitled to hold both his estate by the courtesy and the half interest in the remainder devised to him in the will.

II. For convenience it will be understood that when we hereinafter speak of the defendant it will mean Bernard P. Bogy, Sr., unless it is otherwise expressed.

Even if the law were such as to put the husband to his election, the act of the husband in presenting the will

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for probate and acting as executor thereunder does not, in itself, constitute such an election. [Benedict **Election.** v. Wilmarth, 46 Fla. 535; In re Proctor's Est., 103 Iowa, 232; Smith's Admr. v. Smith, 6 Ky. L. R. 453; Kerrigan v. Conelly, 46 Atl. (N. J.) 227; Williams v. Boul, 184 N. Y. 605; Reaves v. Garrett's Admr., 34 Ala. 558; In re Gwin, 77 Cal. 313; Whitridge v. Parkhurst, 20 Md. 62; Cameron v. Cameron, Ohio Prob. R. 157; Taylor v. Browne, 2 Leigh (Va.), 419; Pace v. Pace, 271 Ill. 114.]

The courts of North Carolina hold that where a widow qualifies as the executrix of her husband's will, she cannot afterward dissent from the will and claim dower. [Mendenhall v. Mendenhall, 53 N. C. 287.] But the reason for that holding is there expressed in these words:

"The right to dissent is inconsistent with her act of qualifying as executrix, and the duties thereby assumed in this:

"1. The appointment and qualification of one as executrix, operates as an assignment in law, and vests the whole personal estate in such executor. If one executes a writing by which he appoints A. B. his executor, that is a will. A. B. thereby becomes the owner of the estate, and, after paying off the debts, is, by the common law, entitled to the surplus.

"If one executes a writing by which he disposes of his property after his death, without appointing an executor, that is a testament. If he does both, that is appoints an executor, and also disposes of his estate, or a part thereof, that is 'a last will and testament.' The executor becomes the owner of the estate, and after paying off the debts and legacies, is entitled, by the common law, to the surplus. Thus, it is seen that *the office of executor* is deemed in law of great importance; it draws to it the ownership, control and management of the entire personal estate, and gives a right (at common law) to the surplus. It is, therefore, manifestly inconsistent for a widow to claim the office and its rights and in-

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cidents under the will, and at the same time to enter her dissent and claim dower, year's provision and a distributive share, as if her husband had died intestate; in other words, there is an inconsistency in claiming the office *under the will*, and at the same time claiming rights as if there was no will."

The common law giving to the executor such surplus was in force in that State. It is the reason for such holding. We have no such law here, and therefore no such reason, and no such rule. There is a special reason in this case, over and above what is shown in most of the other cases above cited. We have a right to assume that the court, at the time of the probating of the will, told the defendant that he was entitled to hold both the courtesy and under the will, for the fact that such advice was given was put in evidence by the plaintiff, and all the evidence in the case is consistent with the fact that such advice was given. It would be remarkable if this court should now hold that he made an election by probating the will and serving as executor after the court had told him that he could take both estates without an election, and in spite of the fact that this court has held that no election is called for unless the will is clear and free from doubt on this point.

III. The fact that the defendant claimed both the courtesy and under the will does not in itself amount to an election to take under the will and relinquish the courtesy. [Cobb v. Macfarland, 127 N. W. (Neb.) 378; Whitridge v. Parkhurst, 20 Md. 62; Schuster v. Morton, 187 S. W. (Mo.) 2.]

IV. If the facts in this case show an election it was an election to take the courtesy and not under the will.

The surviving husband has never received any property under the will. There was no personal property, and the interest in remainder devised to him has never been received by him. If he had sold and conveyed in fee an undivided half of the property and had appropriated to his

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own use the consideration therefor, a different situation would confront us. But there has not been any change in the ownership or possession of the property since the wife's death, except that immediately after her death the husband went into possession and has been receiving the rents. He has claimed to be doing that by right of his courtesy estate. It is strictly in accordance with such estate. It cannot be presumed that he collected the rents for himself and his minor children in accordance with the will. It does not appear that he ever gave bond as their guardian. We note that he represents the minor son here as guardian *ad litem* and not as general guardian. In State ex rel. v. Staed, 143 Mo. l. c. 252, it was said:

"He was not living with his son, but his son was living with him. The estate of the son was not derived from the father, and he had not, so far as the evidence shows, given bond or qualified himself to act as guardian or curator of the estate of the child as required by Revised Statutes 1889, section 5279. It cannot be said, therefore, that his possession was the possession of the child, and it is clear that the fact that the child was living with his father in the premises did not change the character of the father's original possession."

It certainly cannot be held in this case that the possession of the property by the father was as a cotenant with his children in face of the allegation of the petition that he had ousted the plaintiff.

The judgment should be reversed and the cause remanded. *White, C.*, dissents.

The foregoing opinion of Roy, C., in Division, is adopted by WILLIAMS, J., as his dissenting opinion in Banc.

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THE STATE ex rel. ELLIOTT W. MAJOR v. GEORGE H. SHIELDS, Judge, and NAT GOLDSTEIN.

In Banc, December 1, 1917.

1. **DAMAGES: Governor's Refusal to Issue Commission.** A court has no authority to entertain or determine a proceeding which has for its object the assessment of damages against the Governor of the State for failing or refusing to issue a commission to an individual elected to an office.
2. **GOVERNOR'S EXECUTIVE DUTIES: Political: Controlled by Mandamus or Action for Damages.** The power conferred upon the Governor to issue a commission to one elected to office is not ministerial, but political, and its exercise cannot be compelled by mandamus or otherwise controlled, and in consequence no action against him for damages for failure or refusal to issue the commission can be maintained.

Prohibition.

WRIT GRANTED.

Charles G. Revelle for relator.

(1) Our form of State government is divided into three separate and distinct departments—the executive, legislative and judicial—and each is exclusively confided to a separate magistracy. Article 3 of Mo. Constitution. (2) The legislative power is vested in the General Assembly and in the people, and the exercise thereof is not subject to judicial arrest or control. Art. 4, Constitution; Pitman v. Drabelle, 267 Mo. 78; State ex rel. v. Gates, 190 Mo. 555. (3) The judicial power of the State is vested in the courts, and this power cannot be interfered with by the legislative or executive departments. Constitution, art. 6, sec. 1; State ex rel. v. Equitable Loan, 142 Mo. 325; State ex rel. v. Locker, 266 Mo. 384; Foster v. State, 41 Mo. 61; Vail v. Dinning, 44 Mo. 210. (4) No civil action will lie against a judge of a court for a judicial act or a member of the Legislature for a legislative act, even

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though it be alleged that the act was done maliciously. Bradley v. Fisher, 80 U. S. 357; Spalding v. Vilas, 161 U. S. 494; Governor v. State, 127 Ind. 588; Larkin v. Newman, 19 Wis. 82; People v. Hill, 13 N. Y. Supp. 186; 15 Am. & Eng. Ency. Law, p. 1068. (5) In exactly the same degree that the judicial power is vested in the courts and the legislative power in the General Assembly and the people, the executive power is vested in the Governor of the State. Sec. 4, art. 5, Mo. Constitution. (6) Every official act performed by the Governor of the State is executive as distinguished from ministerial. State ex rel. v. Stone, 120 Mo. 428; State ex rel. v. Governor, 39 Mo. 398. (7) It is the constitutional duty of the Governor to take care that the laws are faithfully executed, and in doing so his acts are always discretionary. Sec. 6, art. 5, Mo. Constitution. (8) The courts are entirely without power to directly or indirectly control the official acts of the Governor, whether through remedial writs or civil actions. State ex rel. v. Stone, 120 Mo. 428; Governor v. State, 127 Ind. 588; People v. Governor, 29 Mich. 320; Bradley v. Fisher, 80 U. S. 357; Spalding v. Vilas, 161 U. S. 494; Larkin v. Newman, 19 Wis. 82; People v. Hill, 13 N. Y. Supp. 186; 15 Am. & Eng. Ency. Law, p. 1068; 6 Am. & Eng. Ency. Law, pp. 1006, 1014; 14 Am. & Eng. Ency. Law, p. 1106.

Spencer & Donnell for respondent.

(1) On the death of Charles R. Graves, in June, 1916, the office of circuit clerk of the city of St. Louis, which he held, became vacant, and the Governor appointed James Hagerman to fill this vacancy. This appointment, under the law, was until the next general election. Sec. 2674, R. S. 1909; State ex rel. v. Amick, 247 Mo. 271; State ex rel. v. Perkins, 139 Mo. 115. (2) At the general election of 1916 respondent, Nat Goldstein, was elected circuit clerk for city of St. Louis for the unexpired term of Charles R. Graves, deceased, and was entitled to the office immediately after this election, i. e., so soon as his certificate of election issued. (3) The certificate of election was

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promptly issued to Mr. Goldstein after the general election in November, 1916, and the results of the election were certified, as provided by law, to the Secretary of State, and it then became the duty of the Governor to issue a commission to Mr. Goldstein. Constitution, art. 5, sec. 23; Sec. 2673, R. S. 1909. (4) The duty of the Governor to thus issue the commission was purely ministerial. He had no power to investigate or decide the result of the election. The commission was for the unexpired term of Chas. R. Graves. Every question, either concerning the election or the term of office or the duties thereof, were questions for the courts, not for the Executive. "The questions involved are legal questions." State ex rel. v. Amick, 247 Mo. 294. "The Governor, where he issues a commission for an elective office, is simply performing a ministerial duty, in which he must necessarily be governed by the returns as they appear in the proper office at the seat of government." State ex rel. v. Vail, 53 Mo. 112; State ex rel. v. Draper, 48 Mo. 215; State ex rel. v. Steers, 44 Mo. 227. (5) A commission was necessary because required by law. Secs. 2673, 10197, R. S. 1909. (6) The Governor, without warrant of law, and for personal and party reasons, deliberately and with malice, denied to respondent his legal right, and deprived him of his salary, and wantonly kept him from the office to which he had been elected by the people. (7) A Governor who wilfully and maliciously injures another is liable for the damage he does. "Where the duties of the office [Governor] are ministerial, any individual injured by the official acts of such officer may resort to the courts for redress." Drucker v. Saloman, 21 Wis. 629; Marbury v. Madison, 1 Cranch. 137; Moyer v. Peabody, 212 U. S. 78; 12 R. C. L. 1009. (8) Judges are responsible for wilful illegal misconduct in connection with ministerial duties. 23 Cyc. 538, and 571 and note; State ex rel. v. Graves, 8 Mo. 151; Knox v. Hunolt, 110 Mo. 75; Pike v. Megoun, 44 Mo. 496.

WALKER, J.—This is a proceeding by prohibition to prevent a circuit judge from hearing and determining a suit the purpose of which is to mulct a former Governor of this State in damages for his failure and refusal to

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issue a commission to one elected to the office of clerk of the circuit court of the city of St. Louis.

Upon the filing of the suit for damages the defendant therein, who is the relator here, interposed a demurrer based on the ground that the petition did not state a cause of action. This was overruled; whereupon relator petitioned this court for a writ of prohibition, alleging as a moving reason therefor, as in his demurrer below, that the petition did not state a cause of action and hence no jurisdiction existed in the trial court to hear and determine the case. Upon the issuance of a preliminary order the respondent made return thereto, setting up much extraneous and wholly irrelevant matter. The material parts of this return to which we will alone direct attention are that the plaintiff in the damage suit had at the preceding election in November, 1916, been elected to fill out an unexpired term as clerk of the circuit court of the city of St. Louis and, as alleged in his petition, being otherwise qualified, had—stating his acts in detail—complied with the law entitling him to enter upon the discharge of the duties of said office upon the issuance to him of a commission by the Governor of the State; that the latter had as Governor refused to issue said commission, and plaintiff had thereupon instituted in the circuit court of the city of St. Louis in November, 1916, a proceeding by *quo warranto* against his predecessor, the then incumbent of said office as clerk of the circuit court, who had been appointed as such by the Governor until the general election in November, 1916; and that the said proceeding had been finally determined in favor of the plaintiff and that he had again applied to the Governor for the issuance of a commission, which had been refused until a short time before January 1, 1917, when said commission had been issued and he had entered upon the discharge of the duties of the office; that he was damaged by reason of the refusal of the Governor to issue said commission which would have entitled him to take charge of the office immediately upon his election in November, 1916, instead of his right

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thereto being deferred until January, 1917. These facts, if not explicitly pleaded are to be gleaned from the record before us as the reasons urged by the respondent, why the peremptory writ should not issue.

Relator's motion to strike out parts of this return we have, in effect, sustained by epitomizing only such portions of same as constitute a proper pleading in a case of this character. Thus freed of matters foreign to the issue, there is presented the question of jurisdiction; or, concretely stated, has a court authority to entertain and determine a proceeding which has for its purpose the assessment of damages against a Governor for failing or refusing to issue a commission to an individual elected to an office?

A determination of this question involves a discussion of the triune nature of our government; and as a consequence the relation of each of the departments, thus created, to the others. The origin of this form of government, diverting as a review of same might prove, is pertinent here only so far as same is necessary to an elucidation of the matter at issue. It will suffice to say that the germinal idea of a government of three coordinate branches is first found recorded in Aristotle's *Politics* where it said that "in every polity there are three departments; first, the assembly; second, the officers, including their powers and appointment; and third, the judging or judicial department." The wisdom of this classification and its appropriate application in the framing of the laws of a free government has been illustrated by its incorporation into our national organic law and subsequently into the constitutions of the several states. The central idea in the creation of a government of this form is that the powers created shall be coordinate in their relations towards each other; and while supreme within their respective orbits they shall so move as not to invade the plane of activity of the others. Thus regulated friction in the conduct of public affairs is avoided and that harmony promoted which is most conducive to the stability of government and, as a consequence, to the welfare of the people. A contra-

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riety of opinion is found in the rulings of courts of last resort in different jurisdictions as to what constitutes an invasion by one of these governmental powers of another. This is notably true as to the power of the courts to compel the Governor by a remedial writ to perform an official duty. A compilation of the earlier cases on this subject will be found in *State ex rel. Robb v. Stone*, 120 Mo. l. c. 434, 436, in a well considered opinion by SHERWOOD, J., and in the notes to a later case (*State ex rel. Irvine v. Brooks*, 6 L. R. A. [N. S.] [Wyo.] 750) in another jurisdiction. These variant rulings while assigning somewhat different reasons for the conclusions reached, are based primarily upon the construction placed upon the character of the duty sought to be controlled; the right to the writ being limited to the control of such duties of the Governor as are denominated ministerial. What is meant by ministerial duty, as applied to judicial action, is usually not difficult of determination; but it is otherwise when it is attempted to thus classify executive duties. They are usually clearly defined and the power of their performance confided exclusively to the Governor. In their exercise a degree of discretion is necessarily required. They demand, therefore, no interpretation and are not subject to judicial control. If control is attempted to be exercised, under such a state of facts, it cannot prove otherwise than an invasion of power and hence contrary to the spirit and purpose of the law separating the government into three branches and defining the powers of each. But we are not left to abstract reasoning to determine that power thus conferred upon the Governor is not ministerial. In *State ex rel. Bartley v. Governor*, 39 Mo. 388, this court declared, under a state of facts parallel in all of their material features to those of the case at bar, that power conferred upon the Governor to issue a commission to one elected to an office is political and not ministerial in its character, and as such, aside from any other reason would not authorize the court in granting a writ to control the Governor's action. In addition the court puts its refusal to so act upon a broader ground;

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namely, that the Governor's duties devolve on him by law, under a higher authority than the order of a court, i. e., the mandate of the Constitution. The duties thus conferred are political and his acts are entirely independent of the judiciary and for a failure to perform same he is responsible to the people alone, his liability being that of impeachment. If this court can issue a writ of mandamus to compel the Governor to grant this commission which he improperly or from a mistaken view of the law withheld, by this course of reasoning he may be required by the court to see that the laws are enforced and obeyed. The danger of the assumption of this fact is dwelt upon on the part of the court in that if exercised in one case and a precedent therefor established, no limit thereto can be defined. If the Governor is clothed with political discretion in regard to the execution and enforcement of the law and other duties enjoined on him, so he is concerning the issuance of commissions to those elected to office; and the court has no greater power to prescribe the rule of his conduct in one case than in the other. "This would," says the court, "make the judges the interpreters of the will of the executive, and the independence of the executive department as a coordinate branch of the government would be virtually destroyed."

In re Woodson, 58 Mo. l. c. 372, which was in response to an inquiry submitted by the then Governor to the judges of the Supreme Court, under the authority of a law then in force, the court said: "It is well settled that in issuing a commission the Governor acts in a political or executive capacity, and he alone can judge whether the power should be exercised or not, and the courts can neither compel nor interfere with him in the exercise of this right."

In State ex rel. Robb v. Stone, *supra*, the court announces the doctrine of non-interference even more broadly than in the two preceding cases, it being held that a mandamus would not issue to the Governor to compel the performance of any duty pertaining to his office, whether political or merely ministerial, commanded

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either by the Constitution or the statutes; and, says the court: While it was not expressly so decided in State ex rel. v. Governor, 39 Mo. 388, it was clearly intimated that in the acts authorized by law to be performed by the Governor "there was really no valid distinction between a political and ministerial act when considered with reference to the issuance of a mandamus against him."

It remains to be considered to what extent the rule as here announced as to judicial non-interference with executive action may be considered persuasive or as a precedent in determining the matter at issue. A mandamus proceeding simply seeks to compel action. A denial of the right when directed against the Governor, upon the comprehensive grounds stated in the cases discussed, means simply that as thus sought to be invoked, the right to the writ does not exist. These rulings therefore accord full freedom of action to the Governor in all matters pertaining to the discharge of the duties of his office. If freedom of executive action is thus assured, can it be said that the failure of the Governor to act in a given case will render him liable for such inaction to an individual who claims thereby to have been damaged. To so hold would involve an absurdity, in that while according the Governor freedom of action we would nevertheless hold him liable at the behest of an individual for non-action. The immunity to which the Governor is entitled, is as applicable in one class of cases as in the other. The complete absence of the statement of a cause of action, and the fact, evident from the averments in the petition, that no cause of action exists, gives the trial court no authority to proceed in the premises, from which it follows that the writ prayed for should be made absolute, and it is so ordered. All concur.

ABRAHAM MORRIS v. EDWARD PRYOR, Receiver
of WABASH RAILROAD COMPANY, Appellant.

In Banc, December 1, 1917.

1. **NEGLIGENCE IN CONSTRUCTION OF TRACK:** Curve Near Coal Bin. A spur track passed along the north side of a poultry house in a westerly direction, thence across the street on a thirty-degree curve to the south, which ended in a tangent a few feet west of the street, and extended from that point a distance of fifty-two feet along the north side of a coal bin of an electric light plant, in an almost straight line and at a practically uniform distance of four feet from the bin. The effect of the curved track was that a car forty-two feet long standing at the coal bin in a position to be unloaded stood at a distance sufficient to permit a switchman to stand or move between the car and the bin with safety, but when the car moved eastward, at his signal, its middle portion, owing to the curve in the track, swung in towards the inside of the curve and slowly moved nearer to the coal bin, and crushed him between the car and bin. *Held*, that under the circumstances the construction of the curved track so as to permit the switchman to be injured in the manner he was injured was not a neglect of the master's duty to provide a reasonably safe place in which the servant might perform his appointed work, there being no showing that the company did not do its best, consistently with successful operation, in the location and construction of the track on the line adopted.
2. ____: ____: Reasonably Safe: Absolute Safety. The term "reasonably safe" does not mean that a railroad company is required to construct its track, in its relation to the physical features of the electric light plant it is required to serve, in such a manner that the operation of trains thereon will be absolutely safe, even to careful employees.
3. ____: ____: Assumption of Risks. Railroad trainmen are surrounded with dangers to life and limb under the most favorable circumstances, the risk of which they assume in their employment.
4. ____: ____: ____: Primary Duty of Railroad: Latitude of Judgment in Performance. The primary duty of a railroad is to render that service to the public which the law imposes as an incident to the calling and the exercise of its franchise. In the matter of supplying appliances to meet that duty under diverse conditions it must be allowed a latitude of judgment, since variable

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conditions are important stones in the foundation of the doctrine of assumption of risk; and if its officers and servants undertake the work of performing that duty, under circumstances charging them with full knowledge of all the dangers and difficulties incident to its successful prosecution with the facilities available, without complaint or other expression of dissatisfaction, they assume the risk of injuries resulting from the use of such facilities, even though they would not have occurred in the use of some other instruments or situation designed to accomplish the same purpose.

5. ____: ____: **Experienced Employee: Heedlessly Choosing Dangerous Situation.** The railroad company cannot be charged with negligence in constructing a curved spur track leading to a coal bin of an electric light plant, if the injured switchman, foreman of the crew, experienced in the performance of his work, knowing the tendency of the middle portion of a car to swing in towards the inside of the curve, heedlessly took his position between the car and the bin, when the other side was safe and customarily used, and gave the signal to move, and heedlessly turned his back to the car when it began to move, and was crushed when the car swung in towards the bin, when if he had exercised prudence for his safety a few steps would have enabled him to avoid the accident.

Appeal from Randolph Circuit Court.—*Hon. A. H. Waller, Judge.*

REVERSED.

J. L. Minnis, N. S. Brown and J. A. Collet for appellant.

Defendant's demurrer to the evidence should have been sustained, because: (1) There was no proof of actionable negligence of the defendant. *Railroad v. Newell*, 196 Fed. 868; *Tuttle v. Railroad*, 122 U. S. 189; *Reece v. Railroad*, 239 U. S. 463; *Miller v. Railroad*, 185 Mich. 432; *Haring v. Railroad*, 137 Wis. 367; *Elliott v. Railroad*, 204 Mo. 17; *Coin v. Lounge Co.*, 222 Mo. 506. (2) Defendant furnished to plaintiff a proper and safe place in which to perform his duties, and he voluntarily selected a dangerous place in which

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to perform the same, and was thereby injured. Cases supra; White, Personal Injuries, sec. 358; Moore v. Railroad, 146 Mo. 572. (3) The maintenance of the spur track in its relation to the coal bin, as shown by the evidence, was not the proximate cause of plaintiff's injuries. Railroad v. Wiles, 240 U. S., 448. (4) Plaintiff failed to prove a cause of action under the Federal Employers' Liability Act. Railroad v. Behrens, 233 U. S. 478; Railroad v. Carr, 238 U. S. 260; Pennsylvania Co. v. Donat, 239 U. S. 50; Hench v. Railroad, 246 Pa. 1; Molliter v. Railroad, 180 Mo. App. 84. (5) Plaintiff assumed the risk of injuries arising from the alleged improper maintenance of the track. Cases supra; Railroad v. Horton, 233 U. S. 492; Jacobs v. Railroad, 241 U. S. 229; Bradley v. Railroad, 138 Mo. 293; Hager v. Railroad, 207 Mo. 302; Moore v. Railroad, 146 Mo. 572; Railroad v. Jones, 241 U. S. 181; Southern Ry. v. Gray, 241 U. S. 339.

M. J. Lilly and O. C. Phillips for respondent.

(1) There was proof of actionable negligence of defendant. George v. Railroad, 225 Mo. 364; Murphy v. Railroad, 115 Mo. 118; Charlton v. Railroad, 200 Mo. 437; Fish v. Railroad, 263 Mo. 106. (2) Plaintiff was not guilty of negligence in using an unsafe way furnished by the defendant unless the danger was obvious, even though there was a safer place in which he might have worked. Cases supra; Boehm v. Electric Co., 179 Mo. App. 663; Hutchinson v. Safety Gate Co., 247 Mo. 116. (3) The maintenance of the track in such situation that employees were endangered by the proximity of the building was the proximate cause of the injury. Cases supra. (4) Plaintiff proved a cause of action under the Federal Employers' Liability Act. The test is: "Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?" Shanks v. Railroad, 239 U. S. 556; Mondou v. Railroad, 223 U. S. 1; Pedersen v. Railroad, 229 U. S. 146; Railroad v. Behrens, 233 U. S.

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473; Railroad v. Seale, 229 U. S. 156; Railroad v. Carr, 238 U. S. 260. (5) Plaintiff did not assume risks arising from the improper maintenance of the tracks which were not obvious to him and of which he had no knowledge or notice. Railroad v. Proffitt, 241 U. S. 462; Railroad v. Horton, 233 U. S. 504.

BROWN, C.—This suit was instituted in the circuit court of Randolph County against the receivers of the Wabash Railroad Company, returnable at the February term, 1914, of that court. The appellant is the only remaining receiver. That portion of the petition charging the circumstances of the injury is as follows:

“That at all the times hereinafter mentioned the above named receivers were common carriers engaged in interstate commerce; that is, the transportation of passengers, goods and merchandise from points within the State of Missouri to points in other States of the United States and from points in other States in the United States to Moberly and other points within the State of Missouri. That defendants now have in the city of Moberly, county of Randolph, State of Missouri, offices and agents in charge thereof for the transaction of their usual business.

“Plaintiff further states that on the 25th day of July, 1913, and for some time prior thereto, he was a switchman in the employ and service of the receivers of the Wabash Railroad Company as aforesaid; that he was employed in and about the railroad yards and tracks operated by the receivers in Moberly, Missouri; that as a switchman it was his duty to and he continually was engaged in handling cars, both interstate and intrastate indiscriminately, and that at the time of his injury hereinafter set forth he was engaged in the movement of cars used both in interstate and intrastate commerce, some of which were loaded with merchandise and poultry from points without the State of Missouri, to Moberly, Missouri, and some of which were being loaded with merchandise and dressed poultry destined to points outside the State of Missouri.

"Plaintiff further states that in connection with the aforesaid railroad yards and lines of railway, defendants operated and maintained in Moberly, Missouri, a side-track or spur track extending from the yards and main line of said railroad company up to and past a coal bin belonging to the Moberly Electric Light Company. That the side of the coal bin adjacent to the said spur or side track extended in a straight line while the said spur or side track maintained and operated by the defendants herein extended in a curve, both before and while passing the said coal bin; that the construction of said coal bin and track in reference to each other was such that a car standing at said coal bin in a position to be unloaded stood at a distance sufficient to permit a man with perfect safety to stand or move between the side of the car and the side of the coal bin, but that when a car standing as aforesaid was moved forward, that is, toward the connecting tracks of the defendants herein, the curve in the tracks in connection with the straight side of the coal bin caused the side of the car to be brought in toward and close to the side of the coal bin.

"Plaintiff further alleges that on the 25th day of July, 1913, this plaintiff, in the due course and discharge of his employment in the service of the defendants herein, was required to go in upon this spur or side track described herein and remove an empty coal car standing at the side of the aforesaid coal bin in the position herein-before referred to; that at the time he was engaged in removing this car and in connection therewith he was engaged in handling and moving six or seven other cars, some of which were being used in interstate commerce at that time. That this plaintiff in person and in the due discharge of his employment and duty as aforesaid, made the coupling between the car standing at the coal bin and the cars which were being handled at the same time; that after making the coupling this plaintiff was standing between the side of the coal bin and the car in a position of apparent safety, the tendency of a moving car to be drawn up against the side of the coal bin not being ap-

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parent to a man placed as this plaintiff was. Plaintiff further alleges that he had been in the employ of the defendants herein only for a short time and had never been in on this track before and was not aware of the dangerous conditions existing at that point; that he had never in his twenty years' experience as a switchman seen a building and track constructed in the dangerous manner in which this coal bin and adjacent track were constructed. Plaintiff further states that after making the said coupling and stepping back into a place of apparent safety he, as was his duty, gave a signal to the other employees working with him, to move ahead or out toward the connecting lines of this defendant; that said signal was communicated to the engineer in charge of the engine engaged in moving these cars, and in response thereto the said cars were moved forward, and on account of the conditions hereinbefore described, the car which had been standing at the coal bin moved forward and at the same time the side thereof was quickly drawn in toward the coal bin before mentioned, and this plaintiff, without any fault or negligence on his part, was caught between the side of the moving car and the side of the coal bin and severely injured, as hereinafter more fully set forth. Plaintiff further states that the conditions with reference to the construction of the track and coal bin had existed for a long time and were well known, or by the exercise of ordinary care could have been known, to these defendants. Plaintiff further says that defendants were negligent in constructing and maintaining said spur or switch track with reference to said coal bin in the manner and condition hereinbefore set out, and that he was injured thereby and in consequence thereof."

The answer was a general denial, supplemented by pleas of contributory negligence and the assumption by his employment of the risk of the injury, upon which pleas issue was duly joined.

At the trial during the same term a verdict was returned for \$10,000, upon which the judgment was entered from which this appeal is taken.

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The plaintiff, at the time of the accident, which occurred July 25, 1913, was a switchman employed by the receivers in the Wabash Railroad yards at Moberly, Missouri, where he had been working four months and six days. He was thirty-nine years old, had been engaged in that kind of work for nineteen or twenty years, and in his testimony questions neither his experience nor skill. The yards in Moberly were extensive, containing many platforms for receiving and discharging freight, classified as clearance and non-clearance platforms, the latter term being used to describe those so near to the tracks which served them that there was not room to stand between cars and platform. There were many of these in the yard. It is the duty of the switchman to ascertain whether there is clearance or not. This accident occurred in removing cars from a commercial track serving the electric light plant of the city. This plant was situated on the west side of Dameron Street, having a coal bin in the northeast corner extending about fifty feet southwesterly from the street along the line of the track. The track passed westerly across the street on a curve to the south of thirty degrees, past the coal bin, straightening approximately to a tangent a short distance west of the street and running thence parallel with its north wall, which consisted of a bulkhead constructed of posts driven in the ground and planks spiked to the inside of them. After passing the coal bin it extended along the north wall of the electric light building and practically parallel thereto for a distance considerably greater than the width of the bin.

At the time of the accident there were five cars standing on the spur, the most westerly one of which was the forty-one foot coal car by which plaintiff was injured. It stood at the coal bin, the east end being a few feet west of its northeast corner at Dameron Street and near the point of the thirty-degree curve extending east. This car, which had been unloaded, was to be set out of the spur. There were four other cars on the spur east of it, the nearest of these being another empty coal car belonging to the Wabash, standing in Dameron Street

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nearly a car-length east of the one at the bin. Mr. Morris was foreman of the switchmen engaged in the movement and directed it. He stood at the east end of the car on the south side, next to the bin. Mr. Duggins, one of his switchmen, stood east of him in Dameron Street on the same side of the track, while another switchman was still further east on the top of a car. To make the movement it was necessary that the four other cars should be coupled to pull out the long coal car. This was done and the engineer moved them back to the place where Mr. Morris stood, who saw that the coupling was made and then told Mr. Duggins to go ahead. The latter signaled to the switchman on the top of the car, who transmitted it to the engineer, who began to pull out. Mr. Duggins was looking at Mr. Morris, who was giving directions as to the movements to be made, and when the long car swung into the curve so that its side began to approach nearer and nearer to the bulkhead he saw the danger and promptly began to try to reach the engineer with signals to stop, which were as promptly seen and obeyed, but too late to save Mr. Morris, who, in the act of trying to climb above the car sill, was caught about the pelvis and badly injured, both internally and externally, his life having apparently been saved by the promptness of Mr. Duggins in seeing the danger and acting, and of the engineer in responding.

It was optional with the switchman as to which side of the cars they should stand in doing this work. It was customary, all conditions being the same, to do the work on the right hand side, which is the engineer's side of the engine, where, with a clear view he could be seen, or if, on a curve to the left, to do it inside the curve, where the engine would be visible. In this case the view was equally obstructed on both sides.

In the view we take of the legal aspect of the case the foregoing facts, which are taken from the testimony given and offered by the plaintiff, and are undisputed, are sufficient to its complete understanding, although we shall feel at liberty by way of illustration to refer to

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other statements of respondent in the course of our opinion.

I. This case is founded upon the Federal Employers' Liability Act to recover from the defendant receiver damages for injuries sustained by the plaintiff, a switchman in his service, from being crushed between the side of a coal car and the bin into which it had just been unloaded. The jury were properly instructed as to the distribution of damages under that act in cases

Negligence in
Construction
of Track.

of mutual negligence, so that the only question for our consideration is whether the receivers were negligent as to the plaintiff in the maintenance of the track at which the injury occurred. The track was a spur constructed to give service to two industries. The first of these and the nearest to the connection of the spur with its lead in the railway yard was the Stamper poultry house and the other an electric light plant having a coal bin on the track. A city street extending north and south lay between these two establishments, apparently ending against the railroad yard immediately north of them. The spur passed along the north side of the poultry house in a westerly direction, thence across the street on a thirty-degree curve to the south, which ended in a tangent a few feet west of the street, and extended from that point along the north side of the coal bin and power house of the light company in a practically straight line. Throughout this whole length from the street west it maintained a practically uniform distance of something over four feet from the coal bin and north wall of the power house, the bin occupying about fifty feet of that distance. The maintenance of the track in this relation to the coal bin constitutes the only negligence charged in the petition or relied on by respondent in his argument. It is claimed by respondent to have been negligent because a car being removed from this track upon striking the point of the curve near the west line of the street was sharply deflected to the right by the curvature, so that while this deflection did not bring

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either the wheels or that part of the body which rested immediately over them any nearer to the wall of the coal bin than when it stood on the straight track, it did swing the body of the car between the wheels to the right, so that the middle of the car, when at the point of the curve, instead of having its center line over the center line of the track, as is the case when it moves on a straight track, was much to the right of that position. It is plain that this departure from the line of the track would increase as the car increased in length between its trucks. In this case the car was forty-one feet long and the movement of its side toward the coal bin was so great that it caught the plaintiff, who was standing at that place and crushed him.

The respondent says, in substance, that it was the duty of the railway company to make the place in which he was required to do his work reasonably safe, and that permitting the conditions which caused the car to come so near the bin when, by his direction, it was moved forward, was a neglect of this duty. He makes no suggestion as to how the track should have been constructed at that point, but, as we understand him, invokes the rule applicable to those cases in which by reason of the obscurity of a dangerous condition the servant is led into it in the performance of his duty and injured.

II. In the construction of this track and in using it in the service for which it was designed, the railroad company and its receivers were acting in the performance of

a public duty exacted by law. They not only had the right, but the duty rested upon them under proper conditions to put its track to this plant and to give it the service for the performance of which the railroad company was incorporated. That this work was not without difficulty is shown by the nature of the curve described in the pleadings and evidence. A thirty-degree curve in common talk as well as in technical parlance, means a curve with thirty degrees of tangential deflection in each one

**Reasonably
Safe.**

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hundred feet. From the standpoint of practice its nature is illustrated by this case. From the standpoint of mere curiosity we may imagine that a track so extended would describe a complete circle on a block of ground approximately four hundred feet square. There is nothing in the evidence to indicate that the company did not do its best, consistently with successful operation, in the location and construction of this track on the line that it adopted, and we are compelled to presume it did. It was not required to so construct this track in its relation to the physical features of the industry in such a manner that its operation would be absolutely safe, even to careful employees. Even if we use the term reasonably safe it is a mere relative one, for safety in the operation of a railroad track has a different meaning from the same word when used with reference to the operation of a dry-goods store. Railroad people, like those who go down to the sea in ships, are, as official statistics show, surrounded with dangers to life and limb under the most favorable conditions, the risk of which they assume in their employment. This assumption of risk ordinarily incident to this particular employment we have lately said "is a living part of the law." [Patrum v. Railroad, 259 Mo. 109, and cases cited.]

III. The primary duty of the public carrier by rail is to render that service to the public which the law imposes as an incident to the calling and the exercise of the franchises conferred for that purpose. The work is strenuous, involving the use of powerful and dangerous structures and machinery, requiring the highest skill and greatest care in their construction, maintenance and operation. Approach to the warehouses and docks of its patrons so that all parts of them may be utilized, often calls for the exercise of the highest degree of engineering skill. The curvature of tracks is sometimes the most difficult element of this problem, which involves not only the convenience of both parties, but the availability, use and value of the property to be served. The curvature of the tracks af-

Degree of Care.

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fектs not only the practicability of pushing loads over them with the power available, but the maintenance of the tracks themselves against the tendency to spreading and displacement from the operation of the very forces we are considering as the cause of this accident. A thought suggests these natural difficulties, and that to some extent at least they can be better met by the use of the skill available to the carrier than by the judgment of juries.

When we also consider that some of these carriers, although necessary to the public, must establish and maintain their service upon the limited resources of a small traffic which must therefore be handled, if at all, with inexpensive grounds, structures and appliances, while others with immense traffic that must be rapidly as well as safely handled are able to keep their property in a condition commensurate with its requirements, we are impressed with the latitude of judgment necessary to meet such diverse conditions, and that they are important stones in the foundation of the doctrine of assumption of risk as administered in this State. The carrier has the right to use its own judgment as to the manner in which it can best perform its duties with the means at its disposal, and its officers and employees represent it in the performance of their duties. If they undertake the work under circumstances charging them with full knowledge of all the dangers and difficulties incident to its successful prosecution with the facilities available, without protest, complaint or other expression of their dissatisfaction, they assume the risk of injuries resulting from the use of such facilities, even though they would not have occurred in the use of some other instrument or situation designed to accomplish the same purpose. In such cases there is no negligence on the part of the employer, for it has fully performed its undertaking although the same act might have been negligence as to another who had not assumed the risk lying in the existing conditions.

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IV. The plaintiff at the time of this accident had had nineteen years' experience in the performance of such work, in which he had been employed by some of the great railway companies of the country. He stated that he had long before observed the tendency of the body of a car to move from its position directly over the track toward the inside of a curve upon which its wheels were moving, and even had he not observed it, a man of such experience and skill would be held to know the operation of so simple a law of nature. In his testimony he said that he had not kept it in mind. The situation lay directly before him. The point of the curve around which the wheels were about to pass lay right at his feet, and he would have known had he thought one moment, that the body of the car would soon be swung toward the bulkhead by which he stood. Had he raised his eyes toward the car as it slowly began to move he would have seen it slowly come toward him. It was but two or three steps to the open street and absolute safety toward which the open way lay right before him. Instead of observing this he turned his back toward the track and the car, and stood talking with Mr. Duggins until caught. Even when he told Mr. Duggins to pull out, he had his face to the coal bin and his back to the car. Had he even taken the trouble to look at the car in front when it backed in for the coupling he could not have helped seeing indications of the same phenomenon.

V. There is nothing in the testimony to explain why the plaintiff went in on that side of the car to do the coupling. He was the foreman in charge of the operation, and could do as he pleased. The engine could

not be seen from either side of the car, and Mr. Duggins, who was plaintiff's assistant and testified for him in the case, testified that although he had previously worked in the same capacity at the same place he had never worked on the south side of the track before; that it was customary to work on the safe side; that it was the switch-

*Choosing
Dangerous
Place.*

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man's duty not to wait for somebody to tell him to take the safest place to work; and in doing a coupling where there is not sufficient room to make safety certain he should move out to a place of safety before giving the signal to move. All this testimony relates to rules and practices which illustrate the fact that the plaintiff, master of the situation and director of the entire movement, courted the accident by not only unnecessarily assuming the only position in which the danger existed, but by unnecessarily remaining there after the reason he assigns for taking it had ceased.

Although the respondent places his right to recover solely upon the maintenance of the track in the situation described, and cannot place it elsewhere because in all else he was the *alter ego* of the appellant directing the manner in which its work should be done, he makes no suggestion as to how the track could have been changed to serve the industry as then situated. The inference is that it should have required as a condition to putting in the service, the vacation of the land on which the north-east corner of this coal bin was situated. The answer is that this engineering and economic proposition had been considered and determined, and respondent was employed to obviate this expense and sacrifice of storage capacity by operating the spur in the condition in which he found it, which it is admitted by his evidence could have been easily done in perfect safety. His nineteen years of experience recommended him for the work. The situation was open to his inspection and the conditions which relate to this accident were simple and evident. He represented the appellant in everything connected with this service, and if a change was needed it was his duty to suggest it and if he did not, to perform the duty which he had assumed to do at his own risk. We do not think it necessary to encumber this record with a list of our own authorities upon this point, as many of them are collected and cited in *Patrum v. Railroad*, *supra*. We will not refrain, however, from calling attention to *Haring v. Railroad*, 137 Wis. 367, in which the Supreme Court of

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that state deals with a similar situation. As much as we pity the respondent, whose heedlessness in a work requiring constant watchfulness has brought upon him this injury, we cannot see that the appellant, by negligence, has contributed to it in any degree.

VI. The respondent has cited the following cases in which this court has held that the duty of a railroad company to exercise ordinary care to provide reasonably

Other Cases Distinguished. safe conditions in which the employee may do his work, is not well performed when it permits stand pipes, telegraph poles, fences, buildings and other structures to be maintained so close to its tracks that employees, being on the outside of its moving cars or engines in the performance of their duties, are crushed by them: Fish v. Railroad, 263 Mo. 106; George v. Railroad, 225 Mo. 364; Charlton v. Railroad, 200 Mo. 413; Murphy v. Railroad, 115 Mo. 111. None of these cases relate to employees who heedlessly place themselves between such obstructions and the track and signal the cars to pass them while in that position. Nor do they hold that the railroad company may not adopt such methods in the performance of its public duties as will give the best service to its patrons within the reasonable limits of its ability with safety to its employees; nor that, when it employs experienced people to operate such facilities it has not the conventional right as between itself and such employees, to rely on them to use the obvious means it places at their disposal to secure their safety.

The judgment of the Randolph Circuit Court is reversed.

Railey, C., concurs.

PER CURIAM:—The foregoing opinion of BROWN, C., is adopted by the Court in Banc as the opinion of the Court in Banc. All the judges concur, except *Bond, Woodson and Williams, JJ.*, who dissent.

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WILLIAM A. SMITH v. JOHN W. BERRYMAN et al., Appellants.

In Banc, December 1, 1917.

1. **DAMAGES IN MANDAMUS:** Against Respondents After Peremptory Writ. In a proper situation an independent action for damages will lie to plaintiff in an antecedent mandamus proceeding. Having obtained his peremptory writ plaintiff may, if he show that the return made to the alternative writ by the respondent in the mandamus proceeding was false, have the damages which have accrued to him by reason of such false return assessed either (1) in the mandamus proceeding itself or (2) in an independent action brought for that purpose. But absent a false return, no damages, except costs (and they subject to the court's order), can be recovered in any action brought by relator in the mandamus proceeding against the respondents therein.

Held, by WILLIAMS, J., with whom BLAIR, J., concurs, that whether or not a relator seeking to recover damages resulting from a false return in a mandamus suit must recover his damages in the mandamus proceeding or may proceed in a separate action as in the ancient common law manner of a suit upon a false return, is not for decision in this case, because no mention of a false return is made in the petition, nor does the evidence show that a false return was in fact made, and consequently such question is not for determination in this action.

2. ——: ——: False Return. Within the purview of the common law, and of the present statute (Secs. 2547, et seq., R. S. 1909), no recoverable damages accrue to the relator for that he was compelled to bring mandamus, unless the respondent by making a false return, and thereby raising a false issue of fact, as contradistinguished from pure issues of law, puts the relator to vexation and expense in disproving such false issue of fact. The only difference between the common law and statutes in this respect is that at common law damages were assessed in a separate action, but under the statute they may be assessed in the mandamus proceeding or by independent action; but neither at common law could relator, nor under the statute can he, recover damages unless there was or is a false return.
3. ——: ——: Insufficient Return. A statement in the peremptory writ issued by the Court of Appeals that respondents in the mandamus case "returned to said court an insufficient cause" for re-

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fusing to affirmatively obey the alternative writ, is not a finding, or evidence, that the return was false.

4. ———: ———: Statement in Opinion. If it be true that the Court of Appeals in its opinion in the mandamus case found that the return made by respondents to the alternative writ was false, that fact cannot be considered in the trial of the action for damages, nor by the Supreme Court on appeal, unless that opinion is offered in evidence.
5. ———: ———: ———: Judicial Notice. A court does not judicially notice the facts in the record of another and different case—even if determined in the same court.
6. ———: ———: Failure to Perform Ministerial Duty: Waiver. In an action based on the theory that plaintiff is entitled to damages which have accrued to him at common law by reason of the refusal of respondents in his mandamus suit to perform a ministerial duty, in that, as mayor and city councilmen, they refused to grant him a license to keep a dramshop, he cannot recover, because no such action existed at common law, and none has been created by statute. By asking for his writ of mandamus, relator was compelled to admit, and by operation of law did admit, that he had no adequate remedy by any other action or proceeding.
Held, by WILLIAMS, J., concurring, with whom BLAIR, J., concurs, that plaintiff, having elected to proceed by mandamus to compel the performance of a ministerial duty, thereby abandoned or waived whatever right he theretofore had to bring a common law action for damages resulting from the original refusal of the defendants to perform such ministerial duty.
7. ———: Action at Law: Discretion. The extraordinary prerogative writ of mandamus issues from the law side of the court, but it has at least one attribute in common with extraordinary writs of equity jurisdiction, namely, its issuance is within the court's legal discretion.

Appeal from Iron Circuit Court.—*Hon. E. M. Dearing*,
Judge.

REVERSED

David W. Hill for appellants.

(1) The plaintiff brought this mandamus suit, the defendants made due return to the alternative writ, the facts were agreed upon in writing by both parties in the mandamus case and the relator filed his motion for a

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peremptory writ, which motion was in effect a demurrer. The motion was sustained and the mandamus case, therefore, was disposed of upon a demurrer, and there is no foundation for this action as upon a false return, and defendants' demurrer to the evidence should have been sustained. *State ex rel. v. Ryan*, 2 Mo. App. 303; Secs. 2550, 2551, R. S. 1909; *Achey v. Creech*, 21 Wash. 319. (2) Plaintiff having had the right to plead and recover damages in his mandamus proceeding, cannot, after having prosecuted to a final judgment his action, for mandamus, institute this, a second action and recover damages. *Achey v. Creech*, 21 Wash. 319. (3) Under no circumstances could plaintiff recover counsel fees or other trial expenses, because the plaintiff, if entitled to recover any damages, is limited by the statute to those recoverable in an action as for a false return. *People v. Railroad*, 102 N. Y. Supp. 385.

N. A. Mozley and Ernest A. Green for respondent.

(1) Appellants had only a ministerial duty to perform in granting respondent's application for a dramshop license. The only authority and power which appellants, as members of the city counsel of Poplar Bluff, had with reference to the granting of dramshop license was "to levy and collect a license tax on liquor sellers." When the license tax was paid by respondent, he was entitled to the grant of a license and it was the ministerial duty of appellants to grant same. Sec. 9253, R. S. 1909 (Sec. 5857, R. S. Mo. 1899, amended, Laws 1907, p. 98); *State ex rel. Smith v. Berryman*, 142 Mo. App. 373, 379; *Joplin v. Jacobs*, 119 Mo. App. 134; *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65; 29 Cyc. 1442; *Montpelier v. Mills*, 171 Ind. 175; *Bennett v. Whitney*, 94 N. Y. 302; *Amy v. Supervisors*, 11 Wall. 136. (2) Respondent is entitled to recover the damages sustained by him by reason of the failure and refusal of appellant to perform their ministerial duty towards him. An officer is liable in damages to the person injured, for his failure to perform a ministerial duty. *State ex rel. v. Adams*, 101 Mo. App. 468; *Steadley v. Stuckey*, 113 Mo. App. 582;

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Insurance Co. v. Leland, 90 Mo. 177; State ex rel. v. Green, 124 Mo. App. 88; Baltimore County Comrs. v. Baker, 44 Md. 1. (3) Respondent had the right to recover his damages in a separate action, and was not precluded from doing so because he did not plead and claim them in the original mandamus proceedings. Sec. 2251, R. S. 1909; State ex rel. v. Adams, 101 Mo. App. 471; Steadley v. Stuckey, 113 Mo. App. 582; Insurance Co. v. Leland, 90 Mo. 184; Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65; People ex rel v. President etc. Wappinger Falls, 45 N. Y. Supp. 344, 151 N. Y. 386; McClure v. Scates, 67 Pac. 85; Railroad v. Larabee, 234 U. S. 474; Gardner v. Gas & Electric Co., 154 Mo. App. 674.

FARIS, J.—This is an action for damages brought by plaintiff against the defendants, for that defendant Berryman, as mayor, and the other defendants as members of the city council of the city of Poplar Bluff, refused to grant to plaintiff a license to keep a dram-shop in a certain building in the city of Poplar Bluff. Upon the trial *nisi* plaintiff recovered judgment for the sum of \$150. From this judgment, after the conventional motions, defendants appealed to the St. Louis Court of Appeals. Therein an opinion was written in the case by Judge REYNOLDS, wherein Judges NORTONI and ALLEN concurred. [Smith v. Berryman, 173 Mo. App. 148.] But the learned St. Louis Court of Appeals deeming the views held by them to be contrary to an opinion by the Springfield Court of Appeals, in the case of Gardner v. Gas & Electric Co., 154 Mo. App. 666, ordered that the cause be certified to this court for determination, pursuant to the Constitution, in such cases provided.

Since the facts are to be found in Smith v. Berryman, *supra*, and in State ex rel. v. Berryman, 142 Mo. App. l. c. 378, we need not cumber the books with a very lengthy recital of them. Suffice it to say that some years ago plaintiff herein presented to the mayor and town council of Poplar Bluff, composed then, as before stated, of these defendants, an application for

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a license as a dramshop keeper. Defendants herein refused to grant plaintiff such license. Thereupon, plaintiff brought his action in mandamus to compel defendants to issue a dramshop license to him. Ultimately, this mandamus proceeding was ruled by the learned Springfield Court of Appeals in such wise as that a peremptory writ of mandamus was ordered therein, which writ defendants promptly proceeded to obey, and issued the license to plaintiff, as originally prayed for by him. [Vide, State ex rel. v. Berryman, 142 Mo. App. l. c. 378.]

Thereafter the instant action was brought, and plaintiff, as stated, had judgment herein for \$150. Upon defendants' appeal to the St. Louis Court of Appeals, that court reversed the judgment *nisi*, but deeming their opinion herein to be in conflict with an opinion by the Springfield Court of Appeals they ordered the case sent up to us, and it becomes our duty to rule it here in all respects as if it were a case wherein our appellate jurisdiction is original.

Further facts which we do not state will be found in the several opinions of the courts of appeals at the citations stated, but we reserve the right to refer to such of these facts as are necessary, or which we may find to be cogent in our discussion of the case.

We are of the opinion that in a proper situation an independent action will lie for damages accruing to a plaintiff in an antecedent mandamus proceeding; that such plaintiff having obtained his peremptory writ, may, if he show that the return made to the alternative writ by the respondent in the mandamus proceeding was false, have his damages, which have accrued to him by reason of such false return, assessed either (a) in the mandamus proceeding itself, or (b) in an independent action brought directly for that purpose. But we are also of the opinion that, absent a false return, no damages, except ordinary costs (and these subject to the court's order), can be recovered in any action brought by the relator in the mandamus action against

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the respondents in such action. We think an examination into the common-law history of the proceeding by mandamus clearly demonstrates the correctness of this view.

At common law no issue of fact could be raised upon the return of the respondent to the alternative writ in mandamus. The return was the ultimate pleading in the case, and was conclusive upon the relator, whether such return was true or false, and therefore such return raised nothing but pure questions of law, which went solely to the legal sufficiency of the return. However, if such return were false, an independent ancillary action lay against the respondent for making a false return. If, upon a trial of such latter action, the relator in the mandamus proceeding recovered damages for the making of the false return, he thereby became also entitled *ipso facto* to his peremptory mandamus. [18 R. C. L. 347.] Such a circuitous proceeding being cumbersome and unsatisfactory, the Statute of 9 Anne, ch. 20, was passed in England to abolish it. [18 R. C. L. 347; State ex rel. v. Ryan, 2 Mo. App. l. c. 307.] This statute was adopted substantially, if not literally, in this State in 1825. [Sections 1, 2, 3, and 4, p. 522, Laws 1825.] The second and third sections of the original Missouri act adopting the Statute 9 Anne, read thus:

"Sec. 2. Be it further enacted, That when any writ of mandamus shall be issued out of any court of this State, and return shall be made thereunto, it shall be lawful for the person or persons suing or prosecuting such writ, to plead to or traverse all or any of the material facts contained in such return—to which the person or persons making such return shall reply, take issue, or demur; and such further proceedings, and in such manner, shall be had therein, for the determination thereof, as might have been had if the person or persons suing such writ had brought his or their action on the case for a false return. And if any issue shall be joined upon such proceedings, the person or persons suing such writ shall and may try the same, in such place, as an issue joined on such action on the case should or might have been tried; and in case a verdict should be found for the per-

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son or persons suing such writ, or judgment given for him or them upon a demurrer, or by *nil dicit*, or for want of a replication or other pleading, he or they shall recover his or their damages and costs, in such manner as he or they might have done in an action on the case as aforesaid; and such damages and costs shall and may be levied by execution, as in other cases—and a peremptory writ of mandamus shall be granted, without delay, for him or them for whom judgment shall be given, as might have been if such return had been adjudged insufficient; and in case judgment shall be given for the person or persons making such return to such writ, he or they shall recover his or their costs of suit, to be levied in manner aforesaid.

"Sec. 3. Be it further enacted, That if any damages shall be recovered, by virtue of this act, against any person or persons making such returns to such writ as aforesaid, he or they shall not be liable to be sued in any other action or suit, for the making such return, any law, usage or custom to the contrary notwithstanding."

The above provisions have been carried forward in our statutes practically unchanged in substance, and without any material changes even in verbiage. The Legislature has contented itself with dividing the pronouncement into more convenient sections. [Cf. Secs. 2547, 2548, 2549, 2550, 2551 and 2554, R. S. 1909.] While the meaning of section 2551, supra, is not as clear as it might have been made, we are of the opinion that read in the light of the common-law history of mandamus, as well as in the light thrown upon the meaning thereof by section 2554, supra, which was section 3, supra, of our original enactment, it is fairly apparent that no action lies for damages, *absent a false return*. In short, that within the purview of both the common law and of our present statute, no recoverable damages accrue to the relator for that he was compelled to bring mandamus, unless the respondent by making a false return, and thereby raising a false issue of fact, as contradistinguished from pure issues of law, puts the relator to vexation and expense in disproving such false issue of fact. In such cases, and in no other, can a successful relator in mandamus recover

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damages. In other words, if there is no false return, no damages can be recovered. If there is a false return, damages therefor may be recovered either in the mandamus proceeding itself, or by an independent action brought solely for that purpose. As forecast above, Section 2554, *supra*, strongly (in the light of the common law, conclusively) points to this view. For the latter section says that if damages "shall be recovered, by virtue of this article [referring specifically to section 2551, *supra*], against any person *making return to such writ* he shall not be liable to be sued in any other action or suit *for making such return.*" (Italics are ours.) [State ex rel. v. Ryan, 2 Mo. App. l. c. 308.] Since therefore at common law, the only possible mode of procedure in case of a false return was to sue for damages therefor in a separate action, the language of Section 2554, *supra*, is seen to be a conditional abrogation of the common law, that is to say, said section took away the existing common law right to a separate action for damages, only in the event that those damages had been previously recovered in the mandamus suit. It will be noted that the above statutory provision for the independent action for damages thus negatively allowed, is not bottomed on any *wilful refusal to do* the thing which the mandamus commanded, but "*for making such return,*" i. e., for making the false return, and by such false return putting the relator to trouble and expense to disprove the same.

While liability for neglect or refusal to perform or for misfeasance or malfeasance in the performance of simple ministerial duties is concededly a living part of the law, we think this view is in consonance with the policy of this State and tends to safeguard ministerial, and even judicial officers in their ministerial functions, in the performance of the duties which they owe to the public, and makes for freedom from personal financial constraint in the exercise of their official discretion. If an officer is to be put in fear of financial loss at every exercise of his official functions, manifestly the interest of the public will inevitably suffer from the too complacent attitude thus engendered.

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So much having been said upon the general rule, how stands this case upon the concrete facts? Manifestly, plaintiff cannot recover, unless he shows that defendants made a false return to the antecedent alternative writ of mandamus. There is no evidence upon this record that they did so. For while the peremptory writ was offered upon the trial *nisi* of the instant case, the opinion of the Springfield Court of Appeals, which sets forth the facts and the legal reasons for the issuance of this writ, was not offered. This peremptory writ, which is before us, referring to the return, plainly says that defendants (respondents in the mandamus case) "returned to said court an insufficient cause" for refusing to affirmatively obey the command of the alternative writ. It nowhere says that respondents in the mandamus proceeding *made a return which was false*. It may be that the learned Springfield Court of Appeals so found, and so ruled in the opinion which they filed in the mandamus proceeding, but that opinion was not offered below in this case, and so it is not before us; since we do not judicially notice the facts in the record of another and different case. We notice the law in all cases; we notice the record here even upon successive appeals in the same case (*Keaton v. Jorndt*, 259 Mo. l. c. 189), but we do not notice the record of one case upon the hearing of another and different case (*Banks v. Burnam*, 61 Mo. 76), even in our own court. *A fortiori* the rule prevents us from noticing the facts set out in an opinion of one of the Courts of Appeals in any given case when we are considering here a separate and independent case. [*Haber v. Klauberg*, 3 Mo. App. 342.] If there were any showing upon the record before us that the return made by defendants here, who were the respondents there, was false, then the other question would arise touching whether the sum recovered is made up of proper elements of damage. As the case now stands there is no evidence whatever that defendants here, made in their capacity as respondents in the mandamus case any false return whatever. Such showing as there is, clearly demonstrates that the show-

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ing made by them was true, but merely insufficient as a matter of law.

But plaintiff urges that his action is not under the statutes relating to the procedure in mandamus, which statutes we quote; he contends that he is suing at common law to recover the damages which have accrued to him by reason of the refusal of defendants to perform a ministerial duty. He correctly characterizes his pleadings but the answer is still the same; he cannot recover. No such action existed at common law *following the issuance of a peremptory writ in mandamus*, and none (as we have labored to show by our brief examination into the common-law history of mandamus) has been given by our statute, save and except such damages as directly flow from a false return.

The cases cited to us by learned counsel, as is so clearly pointed out by Judge REYNOLDS (Smith v. Berryman, 173 Mo. App. l. c. 161), are not in point, and are readily to be distinguished from the situation confronting us. Those cases simply hold that an action will lie against an officer whose duty it is to perform, but who refuses to perform, a ministerial act. There can be no doubt upon this point, and no one would be so bold as to contend otherwise, especially in a case which does not call for the exercise of official discretion. If the rule were not so, no suit would lie against an officer upon his official bond by a citizen, injured by a failure to correctly or timely perform a ministerial duty.

The writ of mandamus is an extraordinary prerogative writ, and, while it issues from a law court, or the law side of our circuit courts (Ward v. Gregory, 7 Pet. 633), it has at least one attribute in common with the extraordinary writs of equity jurisprudence, in that its issuance is within the court's legal discretion. This discretion requires a refusal of the writ, if the petitioner therefor have any other adequate remedy by which he may redress the wrong of which he complains. Therefore if the petitioner bring mandamus, he thereby tacitly admits that he has no adequate remedy by any other action or proceeding. The bringing of the man-

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damus suit is therefore logically an election between remedies which are antagonistic to each other. [State ex rel. v. Slavonska Lipa, 28 Ohio St. 665; 19 Am. & Eng. Ency. Law, 904.] Petitioner may not have both his remedy by mandamus *to compel the doing* of a ministerial act, and his action for damages for the refusal *to perform such act*, unless some statute gives him both of these remedies. In some jurisdictions the statutes seem to allow both remedies (Trust Co. v. Finney, 93 Kan. 302), but, as we have already ruled, this is not true in the case of our own statute on the subject. At common law an applicant for mandamus never had both remedies, except upon a condition, and that condition was that his adversary should make a false return, and the reason back of that condition was that the petitioner was concluded by such return. As stated, the Statute 9 Anne, Chap. 20, and our own statute, which is a rescript thereof, simply had the effect to change the cumbersome circumlocution of the procedure. It permitted a traverse of the return and allowed damages to be recovered for a false return in the mandamus proceeding itself.

Neither the research of learned counsel has found for us, nor have our own somewhat exhaustive investigations of the question unearthed a single case at common law, wherein an action for damages has been allowed, absent a false return, *after the granting of relief by the issuance of a peremptory writ of mandamus*. On the other view what was said by Mr. Chief Justice TANEY, in the case of Kendall v. Stokes, 3 How. l. c. 100, seems apposite:

“This objection applies with still more force, when, as in this instance, the party has proceeded by mandamus. The remedy in that form, originally, was not regarded as an action by the party, but as a prerogative writ commanding the execution of an act, where otherwise justice would be obstructed; and issuing only in cases relating to the public and the government; and it was never issued when the party had any other remedy. It is now regarded as an action by the party on whose

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relation it is granted, but subject still to this restriction, that it cannot be granted to a party where the law affords him any other adequate means of redress. Whenever, therefore, a mandamus is applied for, it is upon the ground that he cannot obtain redress in any other form of proceeding. And to allow him to bring another action for the very same cause after he has obtained the benefit of the mandamus, would not only be harassing the defendant with two suits for the same thing, but would be inconsistent with the grounds upon which he asked for the mandamus, and inconsistent also with the decision of the court which awarded it. If he had another remedy, which was incomplete and inadequate, he abandoned it by applying for and obtaining the mandamus. It is treated both by him and the court as no remedy. Such was obviously the meaning of the Supreme Court in the opinion delivered in the former suit between these parties, where they speak of the action on the case, and give him the mandamus, because the other form of action was inadequate to redress the injury, and they would not therefore require the plaintiffs to pursue it."

The demurrer to the evidence ought to have been sustained and the case should be reversed without remanding. Let this be done.

Graves, C. J., Bond, Walker and Woodson, JJ., concur; Williams, J., concurs in separate opinion, in which Blair, J., concurs.

WILLIAMS, J. (concurring)—I concur in the result of the majority opinion and in that portion thereof which holds that the plaintiff, having elected to proceed by mandamus to compel the performance of a ministerial duty, thereby abandoned or waived whatever right he theretofore had to bring a common law action for damages resulting from the original refusal of the officer to perform such ministerial duty.

As to the other question, whether or not a person seeking to recover damages resulting from a *false return* in a mandamus suit must recover his damages in the

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mandamus proceeding or may proceed in a separate suit as in the ancient common law manner of a suit upon a false return, I express no opinion, because such question is not lodged in this case. The petition in this case *does not seek damages arising from a false return. No mention of false return is made in the petition nor does the evidence in this case show that a false return was in fact made.*

It therefore follows that the question as to which way and how he must travel when he does so seek, whether he must go the modern way pointed out by statute (Sec. 2551, R. S. 1909) and have his damages assessed in the mandamus proceeding or if he prefer, go the "obsolete" way (Merrill on Mandamus, sec. 268, page 334), as by independent suit upon a false return, is an interesting question, but one which we need not and therefore should not now determine.

Blair, J., concurs herein.

WILBER LEWIS, Appellant, v. SETH S. BARNES.

In Banc, December 1, 1917.

1. **QUIETING TITLE:** Suit in Equity: Cancellation of Deed: Cloud on Title. An answer asking the court to cancel the deed upon which plaintiff relies to establish his title, as a cloud upon the defendant's title, and a judgment which actually grants this equitable relief, convert the action to quiet title into a suit in equity, and authorize the appellate court to weigh the conflicting evidence.

Held, by FARIS, J., dissenting, with whom BOND, J., concurs, that, in order to entitle defendant to equitable relief and convert the action into a suit in equity, some defense bottomed on well-known equitable grounds must be pleaded, and that a prayer to cancel a deed in plaintiff's chain of title, which in its final analysis amounts only to a contention that defendant's title is better than plaintiff's, does not plead any equitable ground; and the action being one at law, the appellate court cannot settle a conflict on the substantial evidence, but must accept the finding of the trial court sitting as a jury.

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2. **FILING DEED: Date as Shown by Index.** The date the deed was deposited in the office of the Recorder of Deeds, as shown by the "Abstract and Index of Deeds" required by law to be kept, determines the date on which the instrument was filed, and not the certificate on the deed reciting that it was "filed for record" on a subsequent date.

Held, by GRAVES, C. J., concurring, with whom a majority concur, that a deed is filed for record when it is presented to and left with the Recorder of Deeds for record, and the neglect of the Recorder to actually file or record it cannot defeat the rights of a grantee who has actually left it with him for record, and if the Recorder has wilfully or negligently failed to file and record a deed to a homestead oral proof of the fact of its deposit with him is admissible; and, in an action to quiet title, converted by the answer and judgment into a suit in equity, it will be held by the appellate court that a memorandum on the deed in the handwriting of the Recorder reciting that it had been filed in his office on January 6, 1872, and entries in the "direct" and "indirect" parts of the Index Record showing the same date of filing, show a filing on that date, and such fact is not overcome by a certificate attached to the deed and bearing date of July 19, 1872, in which it was stated the instrument was filed on said July 19, 1872, the Deputy Recorder, who made it, testifying that he did not know how the body of the certificate bore the date of July 19, 1872, unless it was a mistake—it being apparent that the deed was filed January 6th, but was not actually recorded until July 19th.

Held, by FARIS, J., dissenting, with whom BOND, J., concurs, that, the cause being an action at law, and the substantial evidence as to the date of the filing of the deed being in sharp conflict, it was for the trial court sitting as a jury to determine its probative force, and his finding that it was filed for record on July 19th the appellate court cannot review; and that the announcement in the main opinion that the direct and cross entries in the Index Record take precedence in comparative probative force over a contrary recital in a solemn sealed certificate made by the Recorder both upon the record and the deed itself, is not in consonance with what has been said by this court in a number of cases.

3. ———: Homestead: Subject to Sale for Antecedent Debts. Under the Homestead Act of 1865 the date of filing the deed conveying land actually occupied by the grantee at the time, fixed the date of the beginning of the homestead, which could not be sold by his administrator to pay debts thereafter contracted by him, unless legally charged thereon in his lifetime; and the title to said homestead, upon the death of the homesteader, vested in his widow, subject to the rights of occupancy by his minor children,

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and it could not be sold by the administrator, even though so ordered by the probate court, to pay such debts.

4. **HOMESTEAD ACT OF 1865: Liberal Construction: Sale to Pay Debts.** Unless the debt of the homesteader, created subsequent to the time he occupied the land as a homestead and filed his deed for record, was legally charged upon the land during his lifetime, in the manner provided by the laws then in force (G. S. 1865, p. 450, sec. 5), no title passed by the administrator's sale made in pursuance to an order of the probate court to pay the debt; and no strained construction of the law will be made in aid of the asserted title acquired by the purchaser at such sale.
5. **—: Reforming Mortgage: Abandonment of Lien: Sale to Pay General Debts.** If the homesteader had really intended that an executed mortgage should convey the homestead and had failed to do so because the land was incorrectly described, a proceeding in equity to reform the instrument so as to "legally charge" the land with the debt might have been maintained after the homesteader's death; but, as the statute of 1865 vested the title of the homestead lands in the widow, such a suit could not have been maintained without making her and the minor children parties, and if brought against the administrator alone a judgment pretending to foreclose the mortgage was void. But in this case the facts show that the administrator abandoned his lien, and caused the administrator and probate court to sell the homestead lands to pay general debts, his own among others, and it is now too late for the defendant who claims under said administrator's deed to abandon that claim and claim under an old lien which he never sought to enforce.
6. **LIMITATIONS: Thirty-Year Statute: Strictly Construed.** An acquisition of land in the manner prescribed by the thirty-year Statute of Limitations (Sec. 1884, R. S. 1909) contains no equity that calls upon the courts to be astute in devising ways not directly pointed out by it to support it; the right has no necessary foundation in merit, and he who claims lands under it must look only to the law for support.
7. **—: —: Directed to Right to Possession: When Begins to Run: Remaindermen.** The thirty-year Statute of Limitations is directed against such persons only as claim or might claim possession of the land; it does not defeat those who owned the title, but were not entitled to possession. For failure to pay taxes it imposes the penalty of forfeiture against the true owner who was entitled to possession and whose duty it was to pay them, but it does not impose such penalty against him who had no such possessory right as made it his legal duty to pay the taxes.
Held, by GRAVES, J., concurring, with whom a majority concur, that it is the duty of the life tenant to pay the taxes, and the law does not impose that duty upon the remainderman.

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Held, also, that the statute does not begin to run until the person entitled to possession both quits possession and quits paying taxes.

8. _____: _____: _____: **Remarriage of Widow: Right of Husband to Possession: Right of Widow's Grantee.** The homesteader died in 1873; in 1875 the widow remarried, and her husband died in 1911, and in 1912 she conveyed the land to her only surviving child, the plaintiff, the other child of the homesteader having died in infancy after his death. No lien was legally charged against the land by the homesteader during his lifetime, and therefore under the then statute the title, upon his death, passed to the widow, for the use and occupancy of herself and his children during their minority. The property was sold by the administrator in 1876, under an order of the probate court, to defendant's grantor, to pay the homesteader's debts. At that time it was not encumbered with taxes. *Held*, that after the widow's remarriage her husband was entitled to the possession, and, as the property was then unencumbered with taxes, the thirty-year statute had not begun to run against her, nor did it begin to run against her or her grantee until the husband's possessory right terminated, and since thirty years have not elapsed since then the thirty-year statute will not operate to divest title out of the widow's grantee and vest it in defendant, although he and those under whom he claims have been in possession under the administrator's void deed and have paid taxes for more than thirty-five years.

Held, by GRAVES, C. J., concurring, with whom a majority concur, that upon the widow's second marriage, the law separated the whole estate in the land then vested in her, into two estates, namely, the possessory right or life estate of the husband, and the remainder in her, and thereafter the right of possession was in the husband during his life, and the thirty-year statute did not prior to her said second marriage begin to run against her unless she had ceased to pay taxes and had abandoned the possession.

Held, also, whether or not the widow paid the taxes prior to her remarriage, she will not be held to have quit the possession until defendant through his void deed claimed the right to possession, and the burden is on him to show that she had sooner abandoned possession, and she did not do that by going away to another state, leaving a tenant in charge and directing her agent to collect the rents and after paying the taxes send the balance to her.

9. **ESTOPPEL IN PAIS.** *Held*, by GRAVES, C. J., with whom a majority concur, that a married woman with no right of possession and no right to sue for possession of land, could not, prior to the Married Woman's Act of 1889, be estopped by acts *in pais*.

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10. **LIMITATIONS: Thirty-Year Statute: Possessory Right of Husband: Married Woman's Act.** Prior to the enactment of the Married Woman's Act of 1889, the right to possession of the wife's lands was in the husband, and that right in all lands antecedently acquired was not affected by that act. Said act was prospective in its operation.
11. **—: Ten-Year Statute: Possession of Administrator.** Adverse possession cannot be founded upon a wrongful taking possession of estate lands by the administrator, even though while it was in his possession it was sold to defendant under a void judgment. The administrator has no title to decedent's real estate, and his official position cannot constitute a claim of title, or furnish a basis for adverse possession.
12. **LACHES: Enhancing Value by Building Railroad.** The true owner cannot be charged with laches for delay in asserting title for that defendant, in his work in promoting and building railroads, had brought these commercial conveniences so close to the land as to greatly increase its value.

Appeal from New Madrid Circuit Court.—*Hon. Frank Kelly, Judge.*

REVERSED AND REMANDED.

James R. Brewer and Wilson Cramer for appellant.

(1) It is established by the undisputed evidence that the land in controversy was occupied and used by Stephen Lewis and family as a homestead at the time of his death on April 5, 1873, and did not exceed in value the sum of \$1500. (2) The deed by which he acquired the land from Wright is dated December 6, 1871, and was deposited for record on January 6, 1872, as shown by the file marks thereon. These file marks are corroborated by the entries in both parts of the "Abstract and Index of Deeds" which state that the deed was filed for record January 6, 1872. The statement in the certificate on the back of the deed that it was filed for record July 19, 1872, is evidently a clerical error. That was the date of recording, as the certificate shows. (3) The "Abstract and Index of Deeds" was a public record. The statute required the recorder to keep in his office a well bound book to be known as the "Abstract and Index of Deeds," containing a direct and inverted index, etc. 2 Wag. Stats., p. 1140, sec. 11, 14, 18. (4)

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The attending circumstances raise the presumption that January 6, 1872, is the correct date of the filing of the deed for record. *Balance v. Gordon*, 247 Mo. 126. (5) Under the statute of 1865 a homestead was not subject to sale under attachment or execution against the head of the family, unless the debt accrued before the homestead deed was filed in the recorder's office for record. G. S. 1865, chap. 111, secs. 1, 7; 1 Wagner's Statute 1872, pp. 697 and 698, secs. 1, 7. The homestead on the death of the husband passed to and vested in fee in his widow. G. S. 1865, chap. 111, sec. 5; 1 Wagner's Stat. 1872, p. 698, sec. 5; *Skouten v. Wood*, 57 Mo. 389; *Gregg v. Gregg*, 65 Mo. 343; *Rogers v. Marsh*, 73 Mo. 68; *Grooms v. Morrison*, 249 Mo. 551; *Armor v. Lewis*, 252 Mo. 577. (7) On the death of Stephen Lewis his homestead vested in fee simple in his widow, Drusilla Lewis, subject to the joint enjoyment of his two minor children until they reached their majority, without being liable for the payment of his debts, "unless legally charged therein in his lifetime." G. S. 1865, chap. 111, sec. 5; 2 Wag. Stat. 1872, p. 698, sec. 5; *Armor v. Lewis*, 252 Mo. 579.

Oliver & Oliver and E. F. Sharp for respondent.

(1) The sale by the administrator of the estate of Stephen Lewis to John Marr of the land in question passed the legal title to Marr. (a) The debt to Marr was created before the acquisition of the homestead by Lewis. The deed from the Wrights to Lewis was not filed for record until July 19, 1872, while the Marr debt was made January 20, 1872, a full six months before. The homestead dates from the filing of the deed for record. Sec. 7, p. 698, 1 Wag. Stat. 1872; *Barter v. Walker*, 165 Mo. 30; *Shudder v. Girvins*, 63 Mo. 394; *Tennett v. Pruitt*, 94 Mo. 145; *Payne v. Findley*, 165 Mo. 191; *Acreback v. Meyer*, 165 Mo. 189; *Rodgers v. Marsh*, 73 Mo. 69; *Anthony v. Rice*, 110 Mo. 229; *Keeline v. Seely*, 257 Mo. 514; *Sperry v. Cook*, 247 Mo. 132. (b) The only competent evidence introduced at the

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seal of the recorder and the certificate by the recorder
ord is the certificate on the deed under the hand and
trial as to the date the Wright deed was filed for rec-
made at the foot of the record as required by law;
both of these show the deed was filed for record on July
19, 1872. The incompetency of the notation on the front
part of the deed was exactly the question before the
court in the following case and decided adversely to
appellant's contention: Marble Co. v. Ragsdale, 74
Mo. App. 42; Sec. 13 p. 1141, 2 Wag. Stat. 1872. (c) The
"Abstract and Index" is no part of the record, and
defendant's objection to its introduction should have
been sustained. Bishop v. Snyder, 46 Mo. 479. (d) If,
as claimed by the appellant, the record of the deed is
wrong, then the recorder is liable to him (appellant)
for the alleged error. The respondent is protected by
the record as he finds it. Terrell v. Andrew County,
44 Mo. 309; White v. Himmelberger, 240 Mo. 23. Sec.
20, p. 1141, 2 Wag. Stat. 1872, does not require recorder
to make any record until fee is paid. No fee paid is
shown on back of photograph copy of deed. (2) The
debt to Marr not only antedated the filing of the deed
from Wright to Lewis but the land was legally charged
during the lifetime of Stephen Lewis by the execution
of the mortgage, January 20, 1872, to Marr. Lewis
was a poor man. His wife states positively that he
owned no other land in New Madrid County; Lewis
told Toney he had mortgaged this land to pay Marr for
the horse; the records of the county show that he never
owned any land in section 20 nor any other land in the
county and his (Lewis') administrator in his inventory
lists this land as having been incumbered with the Marr
mortgage in the lifetime of Lewis, and in the mortgage
itself all the description is correct except the number
of the section, in writing which the scrivener left out
a part of the word "twenty-five," writing only the
"twenty." The conclusion is irresistible this was a
mere clerical error. (a) Under the law as it then was
Lewis had a right to mortgage this land, even conceding
it was his homestead, without his wife joining therein.

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Gladding v. Sydum, 172 Mo. 318. The Marr mortgage was therefore legally charged thereon by Lewis during his life time. (b) This mortgage given by Lewis to Marr was such a lien as could be enforced against this land, notwithstanding the error in the scrivener in failing to write the whole of the word "twenty-five" in describing the section; and being a good and enforceable lien as against Lewis it is equally good against his privies who took with actual knowledge of Marr's right. Black's Law Dictionary, p. 940, title Privies. (3) The pretended claim of the plaintiff is barred by the ten-year Statute of Limitations. 1 Am. & Eng. Ency. Law. (2 Ed.), p. 789. The adverse possession of an administrator may be added to that of a defendant claiming under him. Stotts v. Hanley, 85 Cal. 155. (4) The pretended claim of the plaintiff is barred by the provisions of section 1884, commonly called the thirty-year Statute of Limitations for the non-payment of taxes. Collins v. Pease, 146 Mo. 135; Haarstick v. Gabriel, 200 Mo. 243; Fairbanks v. Long, 91 Mo. 633; Campbell v. Green, 209 Mo. 212; DeHatre v. Edmonds, 200 Mo. 246; Jodd v. Mehitens, 171 S. W. 322; Abels v. Pitman, 168 S. W. 1184; Crain v. Petreman, 200 Mo. 295. The statute began to run on the failure to pay the taxes for the years 1872, 1873 and 1874, and having started to run the marriage of Mrs. Lewis to Burner in 1875 did not toll the running of the statute. The carving out of the two estates in the land occurred after the statute had commenced to run, and as, after her marriage, neither she nor her husband paid the taxes, it continued to run, as to the whole estate. (5) The pretended claim of the plaintiff is barred by laches. Her abandonment of this land was while yet a *feme sole*, as was the notice to her by attorney Hatcher that they were "going to enter suit against this land." Allen v. Moore, 30 Colo. 307; Yates v. Heard, 8 Colo. 343; Kennedy v. Green, 3 Myl. & K. 719; McQuindley v. Ware, 20 Wall. 14; Speek v. Reggen, 40 Mo. 405; Major v. Buckley, 51 Mo. 231. A mere failure to give notice of a right where another without knowledge of the fact is investing his money

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and where it might fairly be concluded that he would not have done so if informed of the fact will generally preclude a subsequent setting up of the right thus concluded. *Fletcher v. Holmes*, 25 Ind. 458. "A person who stands by and permits another to deal with his property as his own will not be permitted, after the transaction is closed without objection from him, to question it." *Peters v. Campbell*, 74 Mich. 498; *Rice v. Bunce*, 49 Mo. 231. Conduct such as the testimony shows in this plaintiff's mother (from whom he derives title) has been often held in this State to be a complete bar to recovery. *Shelton v. Horrell*, 232 Mo. 372; *Toler v. Edwards*, 249 Mo. 167; *Terrey v. Grieves*, 167 S. W. 569; *Cochrell v. Hutchinson*, 135 Mo. 75; *Rutter v. Cartuthers*, 223 Mo. 640; *Stevenson v. Smith*, 189 Mo. 446; *Landrum v. Bank*, 63 Mo. 56; *Bucher v. Hohl*, 199 Mo. 330; *Kline v. Vogel*, 90 Mo. 247; *Hudson v. Cahoon*, 193 Mo. 562; *Moreman v. Tolbert*, 55 Mo. 392; *Loomis v. Railroad*, 165 Mo. 495; *Kroenung v. Goehri*, 112 Mo. 648; *Guffy v. O'Reilly*, 88 Mo. 426; *Troll v. St. Louis*, 168 S. W. 176.

BROWN, C.—This suit was instituted in the New Madrid Circuit Court on June 18, 1912. The petition although a single count contains the usual allegations and prayer for judgment to quiet the title to the west half of the southwest quarter of section 25, township 22 north, of range 13 east, in said county, and also in ejectment for the same land, of which it states that the plaintiff is the owner and that the defendant claims title to the same land by deed from one Stewart, as administrator of the estate of Stephen Lewis, to one John W. Marr, dated August 21, 1876, and duly recorded, which deed he says conveyed no title. The ouster in ejectment was alleged as of June 11, 1912.

The answer claims ownership of the land, denies generally the allegations of the petition not expressly admitted, pleads title by adverse possession for both ten and twenty-four years and also under what is known popularly as the thirty-year Statute of Limitation con-

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tained in Section 1884, Revised Statutes 1909. It also denounces the plaintiff's title as having emanated by deed from one Drusilla Burner, formerly Drusilla Lewis, widow of Stephen Lewis, and charges that in 1873 she abandoned the land and had ever since stood by and seen him making valuable and lasting improvements thereon, and expending large sums of money to increase its value, by reason of all of which it has become greatly enhanced in value. It also deraigns paper title through the administrator of Stephen Lewis, as charged in the petition.

No reply was filed, although the parties went to trial on the issues without objection on that ground.

At the trial the parties agreed that one Susannah Wright was the common source of title through a deed to Stephen Lewis dated December 6, 1871, and duly recorded in New Madrid County. This deed recites a consideration of six hundred dollars. The date of its record is questioned. It was made in Indiana, where the grantor and grantee lived at the time, the latter with his wife Drusilla, to whom he had been married in September of the previous year. They were, as respondent stated in his brief, "extremely poor." Upon receiving their deed they packed their little belongings, consisting of some bedding and other household articles, and came to New Madrid, and in the afternoon of the same day of their arrival took the articles they had brought to the little old log cabin on the land in question, about forty acres of which was cleared, where they lived together until the death of Mr. Lewis on April 5, 1873. In addition to their household goods they brought with them to New Madrid County a little girl—a child of Lewis by his former marriage—and while they were living in the cabin the plaintiff Wilber was born. That this place was the homestead of the Lewises under the provisions of the Homestead Law of 1865 (G. S. 1865, p. 449, sec. 1) is not questioned.

The time of the filing for record of the deed from Wright to Lewis is shown in evidence as follows: On its back is the following: "Deposited for Record this 6th day

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of January A. D. 1872, John A. Mott, Recorder. Recorded in Deed Book 23, Page 416." This endorsement was written by William W. Waters who, at that date, had charge of the office, although he had not been appointed a deputy. After the deed is the following certificate:

"State of Missouri, County of New Madrid—ss. I, John A. Mott, clerk of said court and *ex-officio* recorder in and for said county, hereby certify that the foregoing instrument of writing was filed in my office for record on the 19th day of July, 1872, and the same is duly recorded in Book 23, at pages 414 and 415. Witness my hand and seal of said court hereto affixed, at my office in New Madrid, this 19th day of July A. D. 1872. John A. Mott, Recorder; by Wm. W. Waters, Deputy Recorder. (Seal)"

At the date of this certificate Mr. Waters had received his appointment as deputy. In the "Abstract and Index of Deeds" made under the provisions of section one of the Act of March 25, 1870, the entry in the "front part" arranged in proper columns, was as follows: "Grantor, Wright, S. & F. O.; Grantee, Stephen Lewis, Date of Instrument, December 6, 1871; Date of Filing, January 6, 1872; Nature of Instrument, Deed; Book and Page, Book 23, p. 415; Description, Southwest quarter 25-22-13." The "back part" or Grantee's Index shows precisely the same entries.

After the death of Mr. Lewis, Mrs. Lewis lived on the place with the children until December, 1873, when she returned to Indiana, taking the youngest child with her and leaving the little girl in New Madrid County with Mr. Augustine, a neighbor. She afterwards died. After remaining a while at her old home she went to Illinois, where a married sister resided, and where on August 29, 1875, she married one John Burner, with whom she lived in that State as his wife until his death in September, 1911. On June 8th following, Mrs. Burner conveyed the land to her son, Wilber Lewis, who brought this suit.

After his arrival in New Madrid County and on January 20, 1872, Mr. Lewis purchased a horse from John W. Marr for \$110, giving his note of that date for the purchase price and executing to Marr a mortgage to se-

cure its payment, which purported to convey the west half of the southwest quarter of section *twenty*, in township twenty-two north, of range thirteen east, in New Madrid County. He had no other land in that county at the time than the tract in suit in section twenty-five. This mortgage was recorded on January 26, 1872. It was not signed by Mrs. Lewis, and she testifies that she knew nothing about it.

At some time in December, 1873, one J. C. Stewart was appointed administrator of the estate of Stephen Lewis, deceased. His bond was filed on the thirteenth day of that month. He inventoried this land, and on the inventory made the following note: "John W. Marr has a mortage on this land for \$110, made January 20, 1872; also a mortage to Francis O. and Susanna Wright." No such mortgage as that last described appears in the record. Stewart made his settlement in May, 1880, in which he charged and credited amounts received and disbursed as follows:

| | |
|---|---------|
| "Charges to personal property as shown by the inventory and appraisement..... | \$55.50 |
| To proceeds of sale of land | 100.00 |
| Credits by amount of property delivered to the widow | 12.50 |
| Personal property sold under execution..... | 43.00 |
| By cost of administration.. | 49.25 |
| Cost paid John W. Marr on his judgment.... | 50.75." |

As a voucher he filed the following receipt: "New Madrid Mo., Dec. 22, '73 Rec'd. of Mr. J. C. Stewart all the articles that was appraised at Stephen Lewis place where he died except 7 hogs and one cow that was sold under execution. LEVINE (her mark) LEWIS."

Mrs. Lewis testified that she never knew of the appointment of an administrator, did not know Mr. Levine and never signed any receipt; that she could not write nor read written matter although she could read a little print; that she had never gone by the name of Levine, nor given that as her name.

On August 24, 1874, Mr. Marr brought suit in the New Madrid Circuit Court against Lewis's administra-

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tor alone to recover on the note for \$110 and to foreclose the mortgage given on the land described as in section *twenty* to secure it. There is nothing in the petition to indicate that it had anything to do with the land in question. Judgment was rendered for the amount of the note and this judgment is relied upon to sustain the administrator's sale pleaded by both parties. It was allowed by the probate court and assigned to the fifth class. No attempt is made to rely upon the judgment of foreclosure, which was evidently void because of the absence from the proceeding of the parties in interest, and on its face it does purport to foreclose the equity of redemption of the owners.

Mrs. Burner testified that when she left New Madrid County in December, 1873, she paid all the taxes then charged against the land leaving it clear. That she left a tenant on it and also left Mr. Hatcher, a lawyer, in charge of it, who told her it was clear, and promised to look after it and pay the taxes out of the rent. That she supposed it was going all right until Mr. Hatcher wrote to her that he was about to institute suit against the land. That she wrote to him, but never received any further communication. That hearing nothing about it she supposed the land was gone. Mr. Hatcher sent her \$18, which he wrote he received from the tenant. The land was rented for \$40 per year. When she left she told Mr. Hatcher she was going back to her people and wanted him to look after it, which he undertook to do.

The defendant's counsel, on opening his case, made the following statement:

"Mr. Sharp: It is admitted that the defendant and those under whom he claims has been in the actual, open, continuous, notorious, exclusive and adverse possession of the land in controversy in this lawsuit since the 21st day of August, 1876, claiming to be the owners of the same and that the defendant and his grantors have paid all the taxes on this land since August 21, 1876, and that neither the plaintiff nor anyone for him or under whom he claims paid any taxes on this land in question since August 21, 1876."

The judgment of the court was for the defendant. The theory upon which it was founded is stated in the following instruction given by the court after having been modified against plaintiff's objection:

"It being admitted that Susanna Wright and Francis O. Wright are the common source of title, the court declares as a matter of law that the deed from Susanna Wright and Francis O. Wright to Stephen Lewis, dated the 6th of December, 1871, introduced in evidence by plaintiff, passed the title to the west half of the southwest quarter of section 25, in township 22 north, of range 13 east, to Stephen Lewis; and if the court shall find from the evidence that he had a wife and minor children and resided with them on said land, using and occupying the same as a home and that the same did not exceed in value the sum of \$1500, then said premises constituted his homestead; and if the court shall further find that the said Stephen Lewis died on the 5th day of April, 1873, while so occupying such homestead; leaving his widow, Drusilla Lewis, and two minor children, his homestead passed to and vested in such widow and minor children; that the widow took the same interest in the land that her husband had and the minor children had an interest therein until they, respectively, attained their majority. And the court further declares as a matter of law that, under the homestead law in force in the year 1873, the homestead so vested in such widow and children was not subject to the payment of the debts of said Stephen Lewis, unless legally charged thereon in his lifetime, and that these words mean that there must have been a lien of some kind imposed upon the homestead during the lifetime of said Stephen Lewis, *and the court declares the Marr debt to be a 'lien of some kind' within the meaning of this instruction.*"

The modification by the court consists of the addition of that part italicized in the foregoing copy.

The court also gave, at plaintiff's instance, the following instructions:

"The court further declares the law to be that, if it shall be found from the evidence that Stephen Lewis

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was the owner in fee of the west half of the southwest quarter of section 25, in township 22 north, of range 13 east, and used and occupied the same with his family as a home up to the time of his death; that he left surviving him his widow Drusilla Lewis, and two minor children, and that said land did not exceed in value the sum of \$1500, then upon the death of Stephen Lewis the same passed to and vested in his widow and minor children, the said Drusilla Lewis becoming entitled by operation of law to the fee simple title, subject to the rights of said minors; that if the court shall find that Drusilla Lewis intermarried with John Burner on the 28th day of August, 1875, the said Burner became immediately entitled by virtue of his marital rights to the possession of the said west half of southwest quarter of section 25 and could alone sue for the possession; that his wife had neither right of possession nor of action during his lifetime, and it being admitted in the record that the defendant did not take possession of the premises until August 21, 1876, after marriage of Drusilla Burner to John Burner, her rights are not affected or impaired by Section 1884 of the Revised Statutes, commonly called the thirty-year statute.

"The Court declares as a matter of law that there is no evidence in this cause showing or tending to show that the equitable title to the premises in controversy emanated from the Government more than ten years before the institution of this suit, or at any time, and that the thirty-year statute therefore has no application and cannot be invoked by defendant in this case."

I. The record conclusively shows that the deed from Susanna Wright and husband to Stephen Lewis was "deposited for record" in the office of the Recorder of Deeds for New Madrid County on ^{Date of Filing.} January 6, 1872. The law (Laws 1870, p. 111, sec. 1) provided a special record, the "Abstract and Index of Deeds," in which the date was required to be entered by the recorder when it was filed, and the record *then* made was the record of the act done at the time.

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This is not overthrown merely by a record of the date of the same act not required by law to be made at the time, and purporting to have been made six months afterwards. The last record did not cancel the first. The deed was on file between the two dates as effectually as if the last entry had not been made. The public record made at the time of the act, does not need the strong corroboration afforded by the ordinary file mark on the back of the deed. We are thus relieved from the necessity of further examining the question whether or not this land was exempt from sale by the administrator to pay debts of Lewis contracted before the deposit of the deed for record.

II. In view of the conclusions stated in the preceding paragraph and of the undisputed and indisputable fact that at the time the debt for which Homestead. this land was sold and the administrator's deed under which respondent claims title were made, the land in question was the homestead of Stephen Lewis and visibly occupied by himself with his wife and children as such, no title passed under that sale unless the debt had been legally charged upon said land in the lifetime of Lewis as provided by the statute then in force. [G. S. 1865, p. 450, sec. 5.] It is therefore unnecessary to inquire whether, for the purpose of this case, the time of depositing the deed for record, or its date, or the entry upon the land marked the beginning of the inchoate right which culminated at his death. The question is whether the debt to Marr was "legally charged" upon the land in Lewis's lifetime.

Our Homestead Law of 1865 followed close upon the heels of the Act of Congress of May 20, 1862, under which the greater part of the public domain then remaining was devoted to homes for the people who might acquire them under the protection of the Government against all debts contracted prior to the issuance of the patent. It would be difficult to overestimate the advantage to our national citizenship which has flowed from the operation of this law. Our own Homestead Law is

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founded in the same broad policy. It not only recognizes to some extent the claims of the wife who has cast her lot with the homesteader and become the mother of his children, as well as those of the infant children themselves, but also takes into consideration the advantage to the creditor of a nucleus around which may be gathered the wherewith to pay his debts. We can see no reason why the language of the law should not be fairly construed in furtherance of its purpose.

The "extremely poor" stand as high before the law as the extremely rich. To observe this equality in its administration it is necessary to take into consideration that while the latter are able to purchase many things, including the solicitous aid of counsel, the former are driven to rely upon that solicitude of the law for justice which can neither be bought nor sold. When Mrs. Lewis was driven in the quest for bread for herself and child, the duty rested upon her to do only what she could to preserve her rights in New Madrid County. She left her little home and such other petty interests as she had, in charge of one who agreed to look after it. It was rented for \$40 a year and seems from the evidence to have been worth it, so that its proceeds would have paid her little debt almost as soon as the property was appropriated to a new owner. Under these circumstances there seems to be no reason why a strained construction of the law should be invoked in aid of the title acquired by the debtor.

III. As we have already said, her rights at that time are to be ascertained in answer to the question whether in Mr. Lewis's lifetime his debt to Mr. Marr had been legally charged upon this land. If not, Mrs. Lewis and the minor children took the whole title free from any claim growing out of that debt. [G. S. 1865, p. 450, sec. 5; *Skouten v. Wood*, 57 Mo. 380; *Gragg v. Gragg*, 65 Mo. 343; *Rogers v. Marsh*, 73 Mo. 64; *Johnson v. Johnson*, 170 Mo. 34; *Grooms v. Morrison*, 249 Mo. 544; *Kelsay v. Frazier*, 78 Mo. 111.] The fact that the land was the homestead of the debtor made

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1865, p. 450, sec. 5; *Skouten v. Wood*, 57 Mo. 380;

Gragg v. Gragg, 65 Mo. 343; *Rogers v. Marsh*, 73

Mo. 64; *Johnson v. Johnson*, 170 Mo. 34; *Grooms v. Morrison*, 249 Mo. 544; *Kelsay v. Frazier*, 78 Mo. 111.] The fact that the land was the homestead of the debtor made

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a *prima-facie* case against the validity of the administrator's sale, for at the death of the husband the entire title of which he had been seized vested in the widow and two minor children by force of the statute. They took "the same estate therein of which the deceased died seized," and neither the administrator nor the probate court at his instance had any authority to diminish it. [Balance v. Gordon, 247 Mo. 119, and cases cited and reviewed.]

The trial court held, however, that it had already been diminished at the time of the death of the owner by his attempt to mortgage it, which constituted "a lien of some kind" imposed upon it during his lifetime. This is true in the sense that if the parties to the mortgage intended that it should convey this land and failed by a clerical error of the scrivener, to describe it, the mortgagee might, by a proper proceeding in equity, in a court having jurisdiction, have secured such a correction of the instrument as would "legally charge" the land with the payment of the debt. Had he desired to do this after the death of Mr. Lewis it would have been necessary to make the widow and children, the true owners of the legal title as it then stood, parties to the proceeding and had he then secured his judgment the charge might have related back to the lifetime of the homesteader, and a sale under such judgment might have given the widow and children all the advantages that lie in the sale of a good title, as against the disadvantages resulting from the sale of a possibility, which is not a method favored by our law in the disposition of the property of the innocent and helpless wards of the court. Instead of doing this the debtor ignored the real parties in interest against whom only he was entitled to a judgment charging the debt upon the land and sued the administrator, against whom the court had no jurisdiction to render such a judgment. This was, no doubt, deliberately done, for having obtained a personal judgment against the administrator he presented it to the probate court for allowance in the fifth class, thus waiving and abandoning his lien, rather than to give to the

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parties interested notice that he intended to enforce it. The property was sold, not for the payment of any alleged lien, but to pay the indebtedness of the estate and the entire costs of administration. The final settlement of the administrator illustrates this. The entire personal property was inventoried at \$55.50, a credit is claimed of \$12.50, which the administrator claims to have given the widow upon the evidently spurious receipt, and \$43 charged as having been "sold under execution." There is no attempt in the record to explain why or how property of the estate actually in the hands of the administrator could be sold under execution. The one hundred dollars realized upon the sale of the land is accounted for in round figures as follows. The entire costs of the administration \$49.25, paid to Marr \$50.75, amounting to the even one hundred dollars for which the land was sold, and which had been thus supplied to satisfy the entire costs of administration.

That this sale was absolutely void there can be no doubt. That it was a bungling attempt to obtain the land rather than the payment of the debt is written all over the record. The deed, on its face, left untouched the marital interest of Mrs. Burner, and the administrator divided the proceeds of the sale between himself and Mr. Marr. It is now too late for the present owners to abandon the title they have elected to take and claim under an old lien which they never sought to enforce. It is therefore unnecessary for us to inquire as to the meaning of the Legislature in the use of the words "legally charged thereon in his lifetime," or of the purpose in the deliberate use of the word "legally," since it was discarded in the proceeding.

IV. The real question in this case lies in the attempted application of the thirty-year Statute of Limitation provided in Section 1884, Revised Statutes 1909. This provision is as follows:

Thirty-year Statute. "Whenever any real estate, the equitable title to which shall have emanated from the Government more than ten years, shall there-

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after, on any date, be in the lawful possession of any person, and which shall or might be claimed by another, and which shall not at such date have been in possession of the said person claiming or who might claim the same, or of any one under whom he claims or might claim, for thirty consecutive years, and on which neither the said persons claiming or who might claim the same nor those under whom he claims or might claim has paid any taxes for all that period of time, the said person claiming or who might claim such real estate shall, within one year from said date, bring his action to recover the same, and in default thereof he shall be forever barred, and his right and title shall, *ipso facto*, vest in such possessor."

It will be seen that it is drastic in its nature and a literal construction of its terms might lead to unthinkable results. There are lands in this State which, for the entire period expressed in that statute, have been considered of so little value and it has been so impossible to make them available as homes or for any purpose of agriculture that the taxes have remained unpaid for a period longer than that expressed in that statute, and which have suddenly attained value from the introduction of modern methods of drainage or otherwise. They then become the easy prey of any speculator who shall alight upon them and hold his possession for one year. It is not necessary under its terms that he should pay the taxes himself. It is only required that he be the first comer and that the true owner should not have observed the changed conditions until he has fastened his claws in the title by a year's possession. It is evident that such an acquisition contains no equity that calls upon the courts to be astute in devising ways not directly pointed out in the statute to support it. The right has no necessary foundation in merit, and the beneficiary himself looks only to the law for support. The statute is only directed against such as claim or might claim the possession of the land. The right of the beneficiary lies in *possession* and the claim which can defeat that right can only be directed against such possession.

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A statute of limitations which permits one to obtain title to the wild lands of another by exercising over it possessory acts during one year might amount, in substance, to a legislative act taking the lands of one private citizen and giving them to another without compensation, but we find in the examination of this action that it does not purport to do so, but rather to denounce against the true owner the penalty of forfeiting his land for failure to perform the duty of paying his taxes to the State. To get any added force from this part of the statute we must assume that it was the duty of him who shall or might lawfully claim the possessory right to pay the taxes.

In this case the admission of record is "that the plaintiff, nor any one for him, or under whom he claims, has paid any taxes on this land in question since August 21, 1876." We must therefore assume, taking the record as it is, that when Mr. Marr took possession on August 21, 1876, he did not take it encumbered by unpaid taxes and that the thirty-year statute began to run against whoever was then entitled to possession. [Hall v. French, 165 Mo. 430.] In that case this court, In Banc, said (page 442): "No court has ever held that a right can be barred by limitation before the law permits the owner of the right to come into court, for such a decision would be a solecism, a denial of due process of law, for it would not give the party 'a day in court.' If a remainderman came into court before the life estate had terminated, he would be turned out of court because his cause of action had not accrued. If he did not come into court within thirty years from the time the life tenant, or tenant for years, or tenant by the courtesy went into possession of the qualified estate, he would be turned out of court because he came in too late, albeit, his right of action had not then accrued. No such construction has ever been or could ever be placed upon section 4268, Revised Statutes 1899, and if that section was intended to prescribe any such rule of conduct it would violate the Constitution of Missouri as well as the Constitution of the United States, for it would deprive a

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person of his property without due process of law—without giving him a day in court."

The doctrine so vigorously applied to this statute in that case is still unshaken and is as applicable in this case as to the one then before the court. No adverse entry upon the possession of Mrs. Lewis and the children was made until Marr entered in 1876 under his void administrator's deed. In the meantime Mrs. Lewis had been married to Burner who, by that act, became, by virtue of his marital rights, entitled to the possession of the land in controversy for which he alone could sue. The estate of the children derived directly from their father, terminated with the majority of one and the death of the other, upon which whatever right of possession existed in them also passed to Burner in right of his wife. [Hall v. French, *supra*; Vanata v. Johnson, 170 Mo. 269; Graham v. Ketchum, 192 Mo. 15.] It was held in Graham v. Ketchum, *supra*, that the right of the husband to the possession of his wife's land acquired before the enactment of the Married Woman's Act of 1889 is not affected by the provisions of that act permitting the wife to sue as a *feme sole*. In other words, that act was prospective and as to all property acquired by the husband before its passage his rights remain as they were at common law and in this State before the act was passed. This, the court said, citing Vanata v. Johnson, was the settled law of the State. That principle can, however, have no application to the running of the thirty-year statute in this case, for only twenty-two years elapsed between the taking effect of that act and the institution of this suit. We hold therefore that that statute has no application to this case.

V. The respondent contends that the action is barred by the ten-year statute, because the latter began to run immediately upon the death of Lewis,
Ten-year Limitation. upon the theory that there was a constructive possession of some sort in the administrator adverse to the title of the widow, and to which her disability could not be tacked. Having started the

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statute, like the cork leg immortalized in the old ballad, it could not stop.

There is nothing in this point that requires further elucidation than its bare statement. That the administrator takes no title to the real estate of the decedent is fundamental; and his official position cannot therefore constitute a claim of title. His connection with the possession is confined to obedience which he must yield to the direction of the probate court, which is ~~the~~ mouth-piece through which the law speaks to him. The right remains with those to whom the law gives it. He represents the personal estate only, and has no power to expend a dollar of it upon the repair or maintenance of the realty otherwise than upon the order of the court. [Thorp v. Miller, 137 Mo. 231-239, and cases cited.] It would be preposterous to say that his assertion of right, whether by word or act, could start in motion the Statute of Limitations against every infant having an interest in the ownership, and divest its title by mere delay in the performance of his duties. The respondent cites Spotts v. Hanley, 85 Cal. 155, in support of this position. We see nothing in that case affecting the question before us. It arose under some law of California which under the circumstances gave the right to the administrator to sue in ejectment to recover the possession of the premises, and it was held that the judgment in his favor was an adjudication that the possession of the tenant as against him was wrongful from the date of the beginning of the action up to the time of its rendition, and inured to the heir whom the administrator represented in the suit. It lends no support to the theory that under our law the administrator had a possessory right which he may use by mere delay to defeat the title of the heir.

VI. The question of laches (or estoppel) as presented by this record does not recommend itself to our consideration. We have already suggested that **Laches.** it is the glory of our system of equity jurisprudence that the poor approach its tribunals on the same level as the rich. To maintain this equality it is necessary that the condition of the litigants in that

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respect be taken into consideration; for it would be a poor system that would require the impossible as a condition of justice. This defense is founded upon the fact that Mrs. Burner "stood by" during the entire period of occupation by Mr. Marr and his successors in title, and possession, and saw them, without complaint or interference, expend large sums of money by which the value of the land has been greatly increased. The principal specification dwelt upon by respondent is that in his work connected with the promotion and construction of railways, which has been otherwise profitable to him, he has brought these commercial conveniences so close to this land as to increase its value greatly; and counsel dwell upon the injustice of permitting Mrs. Lewis to classify herself with the beneficiaries of his success. She should be satisfied he thinks with the small fraction of her little investment which enabled her to get back to her friends empty handed, leaving the fruits of the future prosperity of the country to those able to remain and take care of their own.

When necessity required that Mrs. Lewis should leave New Madrid County she did all she could to leave her little interests in safety. She procured a tenant for her land at \$40 per year, paid her taxes and employed a lawyer to look after it, to whom, we must assume, she paid his reasonable charge for the service; and this assumption is supported by the fact that he afterward sent her \$18 from the rental. Her condition afforded no evidence that she could return to look after it. It was a good riddance to those who afterward intervened in their own interest. In shaking her off the lawyer who had promised to take care of her wrote her that he was about to bring suit against her land. On receiving this information she naturally gave up everything as lost. She wrote to him, but received no answer. In bringing suit he was so considerate as to leave her and her children out, so that courtesy was satisfied without sending her a copy of the notice. This, we must assume from the scant evidence before us, was the same suit in which the judgment, void as to her, and which now furnishes the foun-

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dation on which respondent's paper title rests, was entered. She had been successfully eliminated from the scene of action. Her poverty necessarily eliminated her as a disturbing element in the subsequent proceedings, which moved tranquilly forward to the consummation in which respondent's claim consists. He now complains that she made no active effort to assist him. He needed no notice, for the facts were plainly indicated in every phase of the transaction which constituted his claim. To hold that this woman should have looked from her Illinois home to New Madrid County and observed the plight of respondent and protected him in this purchase, when all the instrumentalities of self-protection lay at his hand, would be an indulgence in legal fiction entirely disconnected from any principle of law or justice. It is impossible to read this record without surprise that during thirty-five years devoted to the handling of this title none of the parties interested have recognized the propriety of seeking the aid of Mrs. Burner to protect it.

VII. One other matter has been so strenuously urged as to call for notice. Notwithstanding the stipulation at the trial fixed August 21, 1876, as the date of the origin of respondent's claim and the beginning of the neglect

**Evidence
of Payment
of Taxes.** of Mrs. Burner to pay the taxes, there is evidence that the trial court will be presumed to have considered that that neglect began as early as 1873. We do not so understand the record. The contention is founded upon the

testimony of one Dawson, who was collector from 1873 to 1876, who now has the tax books which constituted his process for the collections of those years; that it was his custom to mark "paid" opposite the charges as they were paid, and that word does not appear opposite the several entries as to this land until 1876, when Mr. Marr paid the taxes. He refused to state his belief that they were not paid and he was right in so refusing, because in that case it would have been his duty to return them as delinquent and collect them, and the fact of their delinquency would be a public record of the county. He says that Mr. Marr paid the taxes of 1876. If the land stood

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charged with previous taxes he could only clear it by paying them also. We do not think that, in the absence of explanation, Mr. Dawson's testimony constitutes any evidence of the non-payment of these taxes. We think that in the absence of such explanation the only inference that can be drawn from the facts so stated is that they were paid, and that is evidently the inference which Mr. Dawson himself drew.

We think that complete justice can be done between the parties in a trial of this case in accordance with the principles herein stated. We accordingly reverse the judgment of the trial court, and remand the cause for further proceedings.

Railey, C., concurs.

PER CURIAM:—The foregoing opinion by BROWN, C., is adopted by the Court in Banc as the opinion of the court. *Woodson, J.*, concurs, *Graves, C. J.*, concurs in a separate opinion in which *Williams, Woodson, Blair* and *Walker, JJ.*, concur. *Faris, J.*, dissents in opinion filed, in which *Bond, J.*, concurs.

GRAVES, C. J. (concurring)—This case had been a source of trouble to me since its resubmission in Banc. The learned dissent of our brother FARIS has been the cause of my reinvestigating the record. I can not conclude that this case is a case at law. The answer in this case carried it to the equity side of the court. Going to that answer we find a plea of estoppel *in pais*, which under some circumstances might be equitable. But leaving out this portion of the answer there is an attempted plea for the reformation of a mortgage (the mortgage from Lewis to Marr) and in the trial of the case evidence was admitted on that plea. But leaving this question out, the answer after detailing all the facts asks the court to cancel of record the deed of Mrs. Burner to Lewis, the plaintiff, as a cloud upon defendant's title, which is an affirmative equitable defense, and what is more, the judgment (see short-form transcript filed here) actually grants this equitable relief and cancels of record this deed because a cloud on defendant's title. The case is therefore one in equity,

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both by the pleadings and the judgment. Our learned Commissioner did not state the facts as fully as might have been done and our learned brother was no doubt misled thereby.

II. The case being in equity the first matter of import is the question whether or not this was the homestead in Lewis's lifetime. The evidence is all one way on this question. He and his family, consisting of a wife and two children, lived there from January, 1872,

*Date of
Filing.*

until June, 1873, when he died. The next ques-

tion is whether or not the deed to this home-
stead was filed for record before the debt to Marr was
created. Upon this point I fully concur with the com-
missioner. The case being in equity we have the right
to review this evidence. It was shown that in the hand-
writing of the Recorder of Deeds was a written memo-
randum that the deed was filed in the Recorder's office
on January 6, 1872. This is what might be called the
file mark of the officer on the instrument when presented
for filing and record. The Index Record and the cross
record thereof both show the same fact, and the only
thing contra is the certificate of the Recorder made by
the Deputy Recorder, which certificate says the deed was
filed for record and recorded on July 19, 1872. On the
other hand the Deputy Recorder was a witness, and when
being shown all these memoranda, and asked how the
body of this certificate happened to have the date July 19,
1872, he said he didn't know unless it was a mistake. To
my mind it is clear. The deed was evidently filed Jan-
uary 6, 1872, but the deed not actually recorded until
July 19, and when the deputy made this certificate on the
deed he made it as of that date. I am satisfied that we
should in all good conscience hold that this deed was filed
for record January 6, 1872. How much further trouble
this holding portends in this, a cause in equity, remains
to be seen.

But going a bit further on the proof as to the filing
of this deed. It must be remembered that it is the filing
of this deed with the Recorder, that fixes the homestead
right as against debts. [1 Wagner's Statutes, sec. 7, p.

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698.] It is not the actual record of the deed, but the actual "filing" which fixes the rights. When a deed is presented to and left with a Recorder of Deeds for record, it is "filed" for record, whether there is a mark made thereon or not. The neglect of the officer to actually file or record the same could not defeat the rights of a party who had performed his full duty by actually leaving the deed with the recorder for record. We suggest these things, because they show the character of proof which may be made of this act of "filing." I have no doubt that if the Recorder had willfully or negligently failed to file and record a deed to a homestead, oral proof of the fact of the deposit of the deed for record would be admissible. Any competent evidence to show this deposit of the deed for record should be heard. But in this case we have the actual file mark of the Recorder, signed by the Recorder (the index and cross index), required by law to be kept, showing the date of filing, and nothing contra but the certificate of record, which as to the date of filing is evidently a clerical error.

III. If the deed to this homestead was filed on January 6th, as I feel that we must hold, the defendant has no valid paper title. Upon the death of Lewis the title passed in fee to his widow (subject of course to the rights of the children, and one of them is dead and the other long since of age), and her deed to the plaintiff carried to plaintiff the legal title in fee.

We then come to the defense of estoppel *in pais*. No act constituting the chain of evidence on this question occurred until long after Mrs. Lewis had remarried in 1875, and her husband became entitled to the possession of these lands. This status was not disturbed by the Married Woman's Act. [Leete v. State Bank, 115 Mo. 184.] This right of possession remained with the husband until his death in 1911. In addition to this, knowledge of these acts was not brought home to the woman prior to the death of the husband. The question is, can a married woman, who is not even entitled to sue for possession, be estopped by acts *in pais*, and which acts have not been brought to her knowledge? Simplifying the question,

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can a married woman with no rights of possession and no rights to sue for possession, be estopped by acts *in pais*? We think not, and in so answering we do not consider the question of her knowledge or want of knowledge of said acts. Estoppel proceeds upon the theory that the party had failed to act, when he should have acted. In this case the woman could not act. She could not sue for possession. Her hands were tied by the law, and it would be an injustice to say that she should be estopped by a state of facts which she could not prevent. She could neither sue for the possession nor prevent acts against the possession. Her marriage was prior to the Married Woman's Act, and upon marriage the rights of possession and all incidents thereto passed to the husband, and in such possession he had a vested right, which was not disturbed by the later Married Woman's Act. There is nothing in the plea of estoppel in this case, however harsh the case may be for defendant.

IV. Nor is there force in the contention of the defendant as to the thirty-year Statute of Limitations, section 1884, Revised Statutes 1909. This is an affirmative defense and the burden of proof is on defendant. There is a dispute about the payment of taxes in 1873. Dawson, the collector, says the books show that the taxes were not paid for the years 1873, 1874 and 1875. The widow swears that she paid the taxes for the year before she left the State and that she rented the land for \$40 per year to a tenant, whom she left in possession, and that Mr. Hatcher, who was attending to her business for her, sent her \$18 out of the rent and she thought he was paying the taxes. But we may pass this matter by, and concede that the taxes were not paid. This thirty-year statute does not begin to run until the party quits the possession and quits paying taxes. In other words, as long as the widow in person or by her tenant was in possession, the mere failure to pay taxes did not start the statute to run. Her possession continued until after her marriage, or at least the defendant did not show her out of possession until the year 1876, when Marr took possession. The defend-

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ant's evidence fails to show that the widow was out of possession prior to December, 1876. The statute, therefore, did not begin to run during the time she was *feme sole*, and could not run when she became covert, as we shall undertake to show.

Mrs. Lewis married Burner in August, 1875. Upon this marriage, the law then separated this whole estate into two estates, (1) the possessory, or life estate of the husband, and (2) the remainder in the wife. The life estate carried with it the duty to pay taxes. This duty was not imposed by law upon the remainderman.

In the case of Hall v. French, 165 Mo. l. c. 442, a case where by deed, the whole estate had been carved into two estates, i. e. one for life and one in remainder, this court held that the thirty-year Statute of Limitations could not apply, and to apply it would be to deprive the remainderman of his property without due process of law. Not only so, but we held that this division of the whole estate into two estates might be by operation of law (as in the instant case) as well as by deed. That case says that "Section 4268, Revised Statutes 1899, has no application to the case at bar," and it has never been overruled. The writer had occasion to review this statute and our previous holdings in DeHatre v. Edmonds, 200 Mo. l. c. 280, and preceding pages. We distinguished the Hall-French case, *supra*, from the DeHatre case, but expressly recognized the doctrines of the Hall-French case. We thus said: "In our judgment if the two estates had been carved from the whole, either by deed or *operation of law*, prior to the beginning of the adverse possession, and the payment of taxes, then section 4268 does not apply, except as to the possessory estate. In other words, does not apply to the remainderman. But on the other hand, if the adverse possession and the payment of taxes began prior to the carving out of the two estates from the whole, then such statute does apply, and as to the whole estate."

In the instant case the two estates were created by operation of law before there was any delinquency in

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the possession. The duty to pay future taxes was upon the life tenant and not upon the remainderman. The thirty-year Statute of Limitations does not apply to the remainderman, as was expressly ruled in both of these cases. I see no good reason to change the rule. I therefore concur in the opinion of the learned Commissioner in so far as it does not conflict with these views, and concur in the result of his opinion. *Williams, Woodson, Blair and Walker, JJ.*, concur in these views.

FARIS, J. (dissenting)—I find myself unable to concur with the views of our learned Commissioner in this cause.

It is elemental, I premise, that this is either an action at law, or it is an action in equity. If it is an action in equity, the doctrine of laches operating on an abandonment, with *scienter* of all the facts, existing through a period of 38 years, coupled with the making of vast and valuable improvements and an increase in value of the premises in dispute from \$200 to \$18,000 would seem to have had the effect of extinguishing the title of plaintiff. [Shelton v. Horrell, 232 Mo. 358.] If it is an action at law, then the findings of the learned trial court on disputed questions of fact in a jury-waived case are conclusive on this court when such findings are supported by any substantial evidence (Woods v. Johnson, 264 Mo. 1. c. 293; Hatton v. St. Louis, 264 Mo. 634; In re Lankford's Estate, *ante*, p. 1; Chilton v. Nickey, 261 Mo. 232), and in any such case, absent error in admitting evidence, or in giving or in refusing declarations of law, the case must be affirmed.

There is scant doubt that the case is one at law; so we need not concern ourselves as to the laches contended for. It was a contest between legal ^{Equitable} ~~Defenses~~ titles solely, and no equitable relief was decreed by the judgment *nisi*. Plaintiff asserted no equities and had no equities to establish. He either has a legal title, or he has no title whatever. Defendant either has a legal title by virtue of the Statute of Limitations, or a title deraigned through the sale to his

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mesne grantor under orders of the probate court, or he has no title of any kind. While defendant in his answer prayed the court *nisi* to cancel as an alleged cloud upon defendant's title, the deed from plaintiff's mother to the plaintiff, being the identical conveyance through which the latter claimed the legal title to the land in dispute, such a mere empty claim in the form of equity is not sufficient to invoke that jurisdiction. Defendant, in order to entitle him to equitable relief and convert the action into one sounding in equity, must plead some defense, or some claim to affirmative relief, bottomed on some one of the well-known grounds upon which equity assumes jurisdiction. Here the deed of which defendant sought cancellation was merely a conveyance in plaintiff's chain of title, which evidenced a claim of title adverse to that asserted by defendant. The only grounds urged for such cancellation were legal grounds, bottomed upon the contention, in the last analysis, that defendant's legal title from the agreed common source is better than that of plaintiff. It is elementary that equity will not assume jurisdiction under these conditions. If equity could be made to take jurisdiction under such facts, every action in ejectment can willy-nilly be thrown into equity by the simple expedient of praying relief (by way of cancellation) against all conveyances evidencing the adverse chain of title.

It is also true that defendant's answer contains abortive and wholly irrelevant recitals, touching a mortgage on the land in controversy. This mortgage it is averred was executed in 1872, but it contained an error in the description of the land. The pertinent recitals in the answer, as likewise does the evidence offered upon the trial, show conclusively that this mortgage is not in defendant's chain of title; that he is not claiming under it and could not claim under it if he desired to do so. Foreclosure, subrogation, reformation and the lien of it, if any there ever was, have all been outlawed by the Statute of Limitations for almost a quarter of a century. Defendant merely recites, seemingly as a sort of sentimental defense, the fact that a mortgage was at-

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tempted to be executed, but such execution failed on account of an error in describing the land. He neither recites facts warranting reformation or foreclosure or subrogation, nor does he pray for any such relief, nor was he upon the facts averred entitled to any such relief, if he had prayed for it.

Granting, at least for the argument's sake, that defendant could not have been heard to complain if the trial court had seen fit to regard the action as one converted into equity by wholly insufficient and irrelevant cross-bills, it is enough

**Questions
of Fact.** to say upon this head, that it was tried below as a suit at law. The learned court *nisi* obviously so regarded it because he gave numerous declarations of law. Learned counsel for plaintiff obviously so regarded it below and so regard it here. For they requested and the court gave many declarations of law upon the trial, and the only errors they have assigned here are bottomed upon the court's giving alleged bad and refusing good declarations of law. We must assume that both the court *nisi* and counsel are not unaware of the settled rule that declarations of law and instructions have no place in an equity suit. No citations are necessary, for the cases are legion, wherein we have ruled that this court upon an appeal is irrevocably bound by the theory upon which a case is tried below. So, in this case there is no room for the doctrine of laches. [Chilton v. Nickey, *supra*; Leslie v. Carter, 240 Mo. 552; Troll v. St. Louis, 257 Mo. 626; Stanton v. Thompson, 234 Mo. 7.]

Plaintiff, being cast *nisi*, had cast on him here the burden of proving harmful error, before we are authorized to reverse the case.

The only errors assigned or complained of, are three, all having reference to the alleged erroneous modification of one instruction, and to the refusal to give two other instructions, which plaintiff offered *nisi*.

I. The court modified an instruction prepared and offered by plaintiff by adding thereto the words "and

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the court declares the Marr debt to be a lien of some kind, within the meaning of this instruction.”
Prior Debt. This instruction as modified, with the modification italicized, reads thus:

“And the court further declares as a matter of law that, under the homestead law in force in the year 1873, the homestead so vested in such widow and children was not subject to the payment of the debts of said Stephen Lewis, unless legally charged thereon in his lifetime, and that these words mean that there must have been a lien of some kind imposed upon the homestead during the lifetime of said Stephen Lewis, *and the court declares the Marr debt to be a ‘lien of some kind’ within the meaning of this instruction.”*

Was this addendum reversible error? I think not. If the court found (a) that Stephen Lewis filed his deed to this alleged homestead on July 19, 1872, and (b) gave his note for \$110 to Marr for the purchase price of a horse on January 20, 1872, or at any time prior to filing his deed for record, then the debt for which the land was sold was a debt contracted before the land became a homestead, and one for which such homestead could be sold. [Sec. 7, p. 698, 1 Wagner’s Stat. 1872; Acreback v. Myer, 165 Mo. l. c. 685; Barton v. Walker, 165 Mo. l. c. 30; Payne v. Fraley, 165 Mo. 191; Keeline v. Sealy, 257 Mo. 498; Sperry v. Cook, 247 Mo. 132.] But citations of authorities are stale and unprofitable, for the *statute in force in the year 1872, at the identical time at which this homestead was acquired*, read thus:

“Such homestead shall be subject to attachment and levy of execution upon all causes of action existing at the time of the acquiring such homestead, except as herein otherwise provided; and, for this purpose, such time shall be the date of the filing in the proper office for the records of deeds, the deed of such homestead, and (in case of existing estates) such homestead shall not be subject to attachment or levy of execution upon any liability hereafter created.” [1 Wag. Statutes, sec. 7, p. 698.]

As the learned trial court might well have found, and evidently, as he did find, the land was sold by the

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administrator under an order of the probate court to pay the debt due to Marr, which debt was contracted on the 20th day of January, 1872, some six months before the deed was recorded. This land was not sold under the defective mortgage given to Marr by Stephen Lewis, in the latter's lifetime. Obviously this was because the erroneous description of the land would have made a sale under this mortgage absolutely void, unless and until the mortgage had been reformed in equity. Marr, the owner of the note which evidenced the above debt, obtained judgment thereon in the circuit court, in March, 1875, and likewise procured in the said circuit court a decree of foreclosure of this defective mortgage. Subsequently, and in May, 1875, Marr filed this judgment in the probate court; had it classified, and thereon later procured an order of sale of the land to pay said judgment debt; following which in due course and duly, as the record discloses, the land was sold, and being stricken off to Marr, a proper administrator's deed was made to him, which deed is in defendant's chain of title. The void mortgage, the judgment of the circuit court, and the abortive decree of foreclosure performed no office here, save and except that they identify beyond dispute the debt for which the land was sold, as being one made on January 20, 1872.

From this it is manifest that the instruction set out above, and which the court modified, was, as offered by plaintiff, absolutely erroneous, for that it did not state the true facts. For when the record is read it appears beyond dispute that there is no mortgage, or mortgage lien in the defendant's chain of title. When the instruction, *as it was offered by plaintiff*, mentions a lien, it seemingly attempted in a far-fetched way to follow the then provisions of section 5, p. 698, of Wagner's Statutes of 1872 (although said section does not contain the word "lien"); whereas the record was utterly barren of facts to bring the case within the purview of the above section. And at the same time this original instruction ignored the provisions of section 7, p. 698, of Wagner's Statutes, when the record was full of facts to bring it within the purview of the prior existing debt provision of the latter

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section, and when such facts were the only facts in the record referring to a debt of any sort.

While therefore the learned trial court would have been justified in refusing this instruction outright, he chose to modify it, and being misled by the plaintiff's inaccurate use of the word "lien," instead of the word "debt," he himself followed this inaccuracy and used in his modification thereof the technical word "lien," where he should have used the broader term "debt." He had the right both under the law and the facts to consider whether the note made to Marr, on January 20, 1872, was *such a prior debt* as under the provisions of section 7 of Wagner's Statutes supra, deferred till its payment, the vesting of a homestead in the widow. So, I am of the opinion that since this modification, while technically inaccurate, was induced by plaintiff's own error, and since it can in no way alter or change the result in this case, under the beneficent provisions of section 2082, Revised Statutes 1909, it is not reversible error.

Upon both of the above controlling questions of fact, especially the first (there is little dispute, and no place for any dispute as to the second), there was conflict in the testimony. No one can assert in the light of this record that there is not substantial testimony to uphold the view manifestly held by the trial court, that the Marr note was a debt within the provisions of said section 7 of Wagner's Statutes. The law is settled, I apprehend, that in a case at law where no instructions are asked or given, or where those which are refused were either properly refused for inherent defects, or because they turned upon disputed questions of fact, the finding of the trial court imports precisely the same verity as a jury's verdict. [Woods v. Johnson, supra; Hatton v. St. Louis, supra.] The modification of the above instruction (the slight technical inaccuracy being disposed of) was warranted or unwarranted, according as the trial court may have found the two questions of fact set out above.

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II. The trial court refused to give the below instructions requested by plaintiff, to-wit:

"2. The court further declares the law to be that the vesting of a homestead in the widow and minor children as set out in the foregoing declaration No. 1, is not dependent on the filing in proper office for the record of deeds the deed of such homestead, and that, as to them, it is immaterial whether such deed be so deposited before or after the incurring of a debt by the husband subsequently to the acquiring of such homestead; that if the court shall find from the evidence in this cause that Stephen Lewis became indebted to John W. Marr by note on the 20th day of January, 1872, the homestead of the widow and children vested in them by the death of Stephen Lewis on the 5th day of April, 1873, was not subject to sale for the payment of such debt, although the court may further find that the deed to such homestead was not filed for record until July 19, 1872.

"3. The defendant having offered in evidence as the source of his title, an administrator's deed, dated August 21, 1876, from J. C. Stewart, as the administrator of the estate of Stephen Lewis, deceased, to John W. Marr, made in pursuance of an order of sale of the probate court for the payment of debts of the said deceased, the court declares as a matter of law that it was incumbent on the defendant, for the purpose of showing jurisdiction in the probate court to order the sale of the homestead of the widow and children of Stephen Lewis, to establish in this cause that the debt for the payment of which such sale was so ordered was incurred by said Lewis prior to his acquiring such homestead, and defendant having failed to offer any evidence proving or tending to prove such fact, said administrator's deed is insufficient and ineffectual to show title in John W. Marr to the premises in controversy."

Instruction 2, supra, was palpably erroneous, unless both the statute which we quote and the written construction thereof by this court have been wrong for forty-five years (Sec. 7, p. 698, vol. 1, Wag. Stat. 1872;

Barton v. Walker, 165 Mo. l. c. 30; Payne v. Fraley, 165 Mo. 191; Acreback v. Myer, 165 Mo. 685; Tennent v. Pruitt, 94 Mo. 145; Berry v. Ewing, 91 Mo. 395; Clark v. Thias, 173 Mo. 628; O'Shea v. Payne, 81 Mo. 516; Creath v. Dale, 69 Mo. 41); hence, it was properly refused and error cannot be bottomed on such refusal. Indeed, appellant in his brief does not question the law on this point; he merely takes issue with the facts. But these facts, as we have seen, were for the trial court.

In substance instruction 2 declares that the homestead vested in the widow free from the liability of being sold for a debt contracted by the husband in his lifetime and prior to the filing for record of the deed of conveyance to the husband of the land claimed as a homestead. It was held otherwise in Vermont before we adopted the law of that State on homestead (Simonds v. Powers, 28 Vt. 354; Perrin v. Sargeant, 33 Vt. 84; White v. White, 63 Vt. 577), and we have always followed the same view, which view is directly in the face of the refused instruction, as the refused instruction is directly in the face of the statute then (in 1872) and now in force. [Sec. 7, p. 698, vol. 1, Wag. Statutes; Sec. 6711, R. S. 1909.] It follows that no reversible error can be bottomed on the refusal to give instruction 2.

III. Coming to the only other ground of alleged error found in the case or urged in the brief, it will be seen that instruction 3, which the court refused to give for the plaintiff (in addition to the fact that it is in diametrical conflict with instruction 2, *supra*), likewise depends for its goodness upon a sharply disputed question of fact. If the court *nisi* found that there was evidence tending to prove that a debt to Marr had been incurred before Stephen Lewis filed his deed for record, then he was right in refusing to give this instruction. Upon this phase we have seen that the trial court, on the question of resolving this contradiction, sat as a jury sits; hence, we cannot disturb his finding of facts; and since his finding of facts dominates wholly the question of error *vel*

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non for refusing this instruction, his action in refusing it was not error. Even if this were not true, we have already seen that refused instruction 2 is diametrically in conflict with refused instruction 3. If the date of the filing for record of the deed of conveyance to a homestead is the date of acquiring such homestead, then this instruction was properly refused on this ground alone. That such date is controlling, all of the authorities agree, and our statute itself provides. [Sec. 7, p. 698, Vol. 1, Wag. Statutes, and cases cited *supra*; Shindler v. Givens, 63 Mo. 394; Osborne & Co. v. Evans, 185 Mo. 509; Sec. 6711, R. S. 1909.]

The above discussion comprehends all of the errors which are urged, or which can be urged upon this record for a reversal thereof. I submit that they are insufficient, and that this case ought to be affirmed.

In passing, I pause to observe that there is much said in the majority opinion with which I do not agree, touching the so-called thirty-years Statute of Limitations, and of the comparative probative weight of the index of deeds, when contradicted by the solemn sealed certificate of record made by the Recorder, both upon the record and upon the deed itself. I think our learned Commissioner's conclusions upon the former point are in divers particulars opposed to what has been said by this court in the well considered cases of Abeles v. Pillman, 261 Mo. 359; Collins v. Pease, 146 Mo. l. c. 139; Rollins v. McIntire, 87 Mo. 496; DeHatre v. Edmonds, 200 Mo. 246; Land & Imp. Co. v. Epright, 265 Mo. 210; Campbell v. Greer, 209 Mo. 199, and that his views upon the latter point are not in consonance with what has been said by this court in the case of Bishop v. Schneider, 46 Mo. l. c. 479, and by Division Two of this court in Keyes v. Munroe, 266 Mo. l. c. 116, and by the St. Louis Court of Appeals in the case of Marble Co. v. Ragsdale, 74 Mo. App. 42, but since the views which I express above, and which I am constrained to take of the law of the case, fully dispose of it, I need not take up further space than merely to record the fact of my non-concurrence in the behalves mentioned. *Bond, J.*, concurs in these views.

JAMES C. KING et al., Appellants, v. HENRY THEIS.

Division One, December 3, 1917.

1. **ESTATE TAIL:** Title in Remainderman. An estate tail at common law is abolished by statute, and the tenant of the fee tail becomes a life tenant, with remainders in fee simple to the person to whom the estate would first pass on the death of the first grantee.
2. **LIFE ESTATE:** Joint Tenants. Unless the testator expressly so declares in his will the devisees are not joint tenants of the life estate.
3. _____: Partition: Binding on Remaindermen. A partition of real estate, which appertains only to a life estate, in the absence of fraud, is binding on the remaindermen of the respective life tenants, the remaindermen in that respect being represented by the owners of the preceding estate.
4. _____: Death of Remainderman: Partition: Limitation. Where testator devised his entire farm to a daughter for life or until her marriage, and, in the event of her marriage, to his two married daughters and a son as tenants in common for life, with remainder in fee in their respective bodily heirs, and said daughter married, and partition suit was brought, to which all the named devisees were parties, the portion allotted to the son, upon his death in 1899 leaving neither wife nor descendants, vested in the surviving daughters, and the action of the children of one of them to recover that portion, brought on March 28, 1914, was barred, by the ten-year Statute of Limitations and Sec. 1883, R. S. 1909, by a foreclosure sale under a deed of trust placed thereon by the son in his lifetime and the continuous possession thereunder by the purchaser, if said daughter's disability of coverture was removed by her husband's death on December 25, 1904, and she died in 1912 without instituting suit.
5. **LIMITATIONS: Not Pleaded.** Evidence in support of the Statute of Limitations is admissible under a general denial.

Appeal from Howard Circuit Court.—*Hon. A. H. Waller,*
Judge.

AFFIRMED.

Kenneth McC. DeWeese and Bailey & Hart for appellants.

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(1) Upon the marriage of Fanny E. Cooper the devise made in item three of the will of David Cooper, was to the four children as a class, and the devise was to them and the bodily heirs of each of them, thereby entailing the real estate upon them. *Long v. Timms*, 107 Mo. 519; *Faris v. Ewing*, 183 S. W. 280; R. S. 1909, sec. 2874. (2) The survivor of the four children of David Cooper, Sallie A. King, took the whole estate as a life tenant, and upon her death the plaintiffs herein took the estate in fee simple as purchasers under their grandfather's will, and not as heirs at law of their mother, Sallie A. King. R. S. 1909, sec. 2872. (3) After the partition proceedings, the deed of trust executed by Joseph D. Cooper, the trustee's deed made under foreclosure, and the mesne conveyances thereafter made, through which the defendant claims, conveyed no greater estate than that of which Joseph D. Cooper was possessed, and as he was not the surviving life tenant, and died leaving no bodily heirs, the estate conveyed by all said deeds terminated with his death, and his share passed under the will. (4) Plaintiffs could maintain no action until after the death of Sallie A. King. (5) A judgment in ejectment is not *res adjudicata*, and persons who were not parties or privies to a cause of action are not bound by a judgment rendered therein. *Crowl v. Crowl*, 195 Mo. 338. (6) A judgment not based upon a sufficient record, to which it must be responsive, is *coram non judice*, and void. *Charles v. White*, 214 Mo. 187. (7) Sec. 2092, R. S. 1889, was repealed in 1897. The suit of Louis L. Lynn against these plaintiffs and others was brought in 1900, and the judgment and proceedings in said case, which was brought under said section are void. *Merriwether v. Love*, 167 Mo. 514; *Hudson v. Wright*, 204 Mo. 412. (8) The Statute of Limitations, and the doctrine of adverse possession, as defense, must be pleaded in all cases except ejectment, and this for the eminent reason that a judgment is *res judicata* in all matters save ejectment. *Johnson v. Ragan*, 265 Mo. 420, 447; *Stevenson v. Smith*, 189 Mo. 466. Possession during a life tenancy cannot

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be adverse to the remainderman, who is not entitled to possession until the termination of the life estate.

J. H. Denny and *Roy D. Williams* for respondent.

(1) Joseph Cooper died January 1, 1899, leaving no wife or children. The land then, under the statute or under the will—it is immaterial which—vested in his surviving sisters, Eliza Woods and Sallie King. The land at this time was in the open, notorious and adverse possession of Lynn and has remained so in him and his grantees ever since. Dyer King, the husband of Sallie King, died December 25, 1904. Eliza Woods died February 9, 1908. This suit was begun March 28, 1914. Therefore, Sallie King had only ten years from the time of the adverse possession, provided she were free from disability, in which to assert her right to the possession of said land. Said land, therefore, is vested in defendant by virtue of the Statute of Limitations. Sec. 1881, R. S. 1909; *Rutter v. Corrothers*, 223 Mo. 648; *Gray v. Yates*, 67 Mo. 601; *Bird v. Sellers*, 113 Mo. 580. Likewise all claims to the interest of Eliza Woods were barred in three years after her death. She died February 9, 1908. Sec. 1883. R. S. 1909; *DeHatre v. Edmonds*, 200 Mo. 246; *Rutter v. Corrothers*, 223 Mo. 648; *McKee v. Downing*, 224 Mo. 132. (2) The devise was not a joint one to the children of David Cooper as a class and to the survivor for life, and to the heirs of the body of such survivor. *Charles v. White*, 214 Mo. 196; *Peterson v. Jackson*, 63 N. E. (Ill.) 643; Sec. 2878, R. S. 1909. Under the Statute *de donis*, upon the death of Joseph Cooper without leaving heirs of his body, this land would revert to the estate of the testator, and the title would vest in his two surviving daughters, Sallie A. King and Eliza J. Woods. 16 Cyc. 608; *Peterson v. Jackson*, 63 N. E. 645; *Lewis v. Barnhart*, 43 Fed. 864. The same result would follow under the statute of 1855 abolishing estates tail. *Clarkson v. Clarkson*, 125 Mo. 381; *Brown v. Rogers*,

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125 Mo. 392; Clarkson v. Botten, 143 Mo. 47. (3) The division of the land by commissioners appointed by the circuit court in the partition suit, in which the persons then interested were made parties, is binding upon the remaindermen, and those who might take the estate under the will upon the death of Joseph Cooper. The land was held in severalty by the devisees after this partition suit. Accord v. Beatty, 244 Mo. 226; Stockwell v. Stockwell, 262 Mo. 682. (4) The plaintiffs in the present suit were all parties to the partition suit in 1878 and are bound by the judgment of the court rendered in that case. Sparks v. Clay, 185 Mo. 393; Reindeers v. Koppelman, 68 Mo. 482; Hart v. Stedman, 98 Mo. 452; Porter v. Davis, 38 Mo. 113; Ketchum v. Christian, 128 Mo. 42; Real Estate Co. v. Lindell, 142 Mo. 83; Secs. 25 and 34, chap. 104, Wagner Stat. 1872. (5) The judgment is partition estops the parties to the suit from setting up any adverse claim afterwards. And this applies to married women the same as to other persons. Ketchum v. Christian, 128 Mo. 43; Truesdail v. McCormack, 126 Mo. 39. (6) A judgment against an infant is binding, however irregular the proceedings, until set aside on appeal or by a direct proceeding for that purpose. Castleman v. Perry, 50 Mo. 583; Shields v. Powers, 29 Mo. 315; Hite v. Thompson, 18 Mo. 461; Shaw v. Gregoire, 35 Mo. 342; Freeman on Co-tenancy & Partition (2 Ed.), p. 626. The guardian *ad litem* of an infant is clothed with full powers of his ward after removal of disabilities. LeBurgoise v. McNamara, 82 Mo. 189. (7) The plaintiffs are estopped by their answer in the suit to quiet title, in which they not only disclaimed any right, title or interest in this land in themselves, but further, that the title was in their mother, Sallie A. King, and their aunt, Eliza J. Woods, in fee simple. Michalski v. Grace, 151 Mo. App. 631; 16 Cyc. 795, 797; Bensiek v. Cook, 110 Mo. 182. (8) The plea of limitation is admissible under a general denial. Johnson v. Calvert, 169 S. W. 81; Johnson v. Calvert, 260 Mo. 280; Stoeker v. Green, 94 Mo. 280; Coleman v. Drone,

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116 Mo. 391; Bledsoe v. Sims, 53 Mo. 307; Campbell v. Light Co., 84 Mo. 352; Nelson v. Braddock, 44 Mo. 601; Stevenson v. Smith, 189 Mo. 447; Fairbanks v. Long, 91 Mo. 628; Pattison's Code Pldg. (2 Ed.), sec. 684.

BOND, P. J.—I. This is an action in two counts, one for an ejectment and the other to try title. The subject of the suit is twenty-six acres of land lying in Howard County, which were a part of the farm of David Cooper, who died in 1869, leaving four children, to whom he devised the land in question by the following clause of his will:

"3rd. It is my wish that my daughter Fannie E. Cooper have the use of my farm on which I now reside, during her natural life or until she is married, after which I desire that my children, J. D. Cooper, Eliza J. Woods and Sallie King shall have an equal part of my estate both real and personal share and share alike, and that it shall descend to the bodily heirs of each of them thereby entailing my estate upon them. If my daughter Fannie E. Cooper shall marry then she is to have an equal share with the rest."

The four children mentioned in this clause of the will died respectively in 1897, 1899, 1908 and 1912, none of them leaving any issue except Sallie A. King, who left six children, the plaintiffs in the present suit.

In April, 1878, three of the devisees mentioned in the above clause of the will brought an action against the other devisee, Sallie King, and her husband and children (the present plaintiffs), to partition the land of which their father died seized, including the twenty-six acres in controversy. Partition was prayed according to the provisions of the will. The present plaintiffs (then minors) were made defendants and were represented by a guardian *ad litem*, a decree in partition was granted, and the land divided into four parcels, numbered 1, 2, 3 and 4, and allotted in severalty to each of the four children of David Cooper.

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Thereafter Joseph D. Cooper, executed a trust deed to secure a note for \$500, in favor of L. L. Lynn, on forty acres allotted to him by the decree in partition and which includes the twenty-six acres in controversy.

The defendant of the present action claims by mesne conveyances from L. L. Lynn, to whom the land was conveyed by the trustee under the foreclosure of said trust deed.

In June, 1900, L. L. Lynn, in virtue of his purchase of said land, brought a suit under section 2092, Revised Statutes 1889, making all of the present plaintiffs parties, and they were duly served with process, but after taking legal advice, declined to appear in said action. But the attorney who represented other defendants, also filed an answer on behalf of the present plaintiffs, wherein they disclaimed any interest in the land. In that case the prayer of the petition filed by L. L. Lynn was granted. On the trial of the present suit defendant relied on these prior suits as creating an estoppel, the Statute of Limitations, and his paper title.

A judgment was rendered in his favor, from which plaintiffs have duly appealed.

II. The true intent and meaning of the will of David Cooper was, first, to devise an estate for life or until her marriage to Fannie E. Cooper in the entire farm; second, in the event of her marriage, to devise the entire farm to her and his three other children as tenants in common for life with remainders in fee to their respective bodily heirs; third, in case of the death of Fannie E. Cooper, while unmarried, to devise the entire farm to his other three children with similar remainders.

This construction is necessarily applicable to the terms of the third clause of the will of David Cooper, for the reason that by its language an estate tail at common law would have arisen upon the marriage or death of Fannie E. Cooper, and since that form of ten-

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ure is now abolished, the tenant of a fee tail becomes a life tenant with remainders in fee simple to the person to whom the estate would first pass on the death of the first grantee. [R. S. 1909, sec. 2872.] It was not the intent of the testator to make any of the devisees joint tenants of the life estate, for he did not expressly so declare in his will, which is the positive requirement of the statute governing the creation of joint tenancies. [R. S. 1909, sec. 2878.] These conclusions are in strict consonance with the *directions of the will* and the *intent* of the testator, which are the measure of its meaning when not opposed to the requirements of the law. This was the criterion of construction at common law, of which the statute is simply declaratory. [R. S. 1909, sec. 583.] It follows that upon the death of Joseph D. Cooper, January 1, 1899, leaving neither wife nor descendants, his allotment of the land in the partition between the children of David Cooper, vested in his surviving sisters Eliza Woods and Sallie King. That partition, while it appertained only to a life estate, was binding, in the absence of fraud, upon the remaindermen of the respective life tenants who in that respect were represented by the owner of the preceding estate. [Stockwell v. Stockwell, 262 Mo. l. c. 683; Sparks v. Clay, 185 Mo. l. c. 408.] At the death of Joseph D. Cooper the land in controversy, through the foreclosure of the trust deed thereon given by him, passed into the possession of L. L. Lynn, who and his successors in title, have continued in adverse possession thereof until the institution of this suit. According to the holding in DeHatre v. Edmonds, 200 Mo. 246, and Shohoney v. Railroad, 223 Mo. 649, the ten-year Statute of Limitations would bar these two sisters under the facts in this record, for the disability of coverture of Mrs. King was removed on December 25, 1904, by the death of her husband and she, notwithstanding which, brought no action prior to her death in 1912, nor was the present action brought until March 28, 1914, about fifteen years after the death of Joseph Cooper. The bar of the statute is equally conclusive as to Mrs. Eliza Woods and those who claimed

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under her. It began to run in January, 1899, she died under coverture February 9, 1908, wherefore the plaintiffs claiming under her could only have had the time prescribed by the statute in such cases to bring their suit, which time had fully expired before the institution of the present action. [R. S. 1909, sec. 1883.]

It being thus apparent upon the conceded evidence the plaintiffs could not recover as against the defense of the Statute of Limitations arising in the open, notorious, exclusive and continuous possession on the part of the defendant and those through whom he claimed, it is unnecessary to discuss whether or not the plaintiffs were not bound by the unreversed judgment of the court in the partition suit between the life tenants in 1878, to which action the plaintiffs were made parties and personally served with process. [Castleman v. Relfe, Guardian of Perry, 50 Mo. 583; LeBourgeoise v. McNamara, 82 Mo. 189; Freeman, Co-Tenancy and Partition (2 Ed.), p. 626.] The evidence in support of the Statute of Limitations was admissible under a general denial. [Nelson v. Brodhack, 44 Mo. l. c. 601; Stevenson v. Smith, 189 Mo. 447; Johnson v. Calvert, 260 Mo. 442.]

The judgment of the trial court is affirmed.

All concur.

WILLIAM J. JOHNSTON, Appellant, v. L. ANNA
GRICE et al.

Division One, December 3, 1917.

1. **JURISDICTION: Of Circuit Courts: Accounting: Trust Fund: Suit Against Executors.** A petition, filed by plaintiff in his individual capacity, having for its object an accounting in respect to a trust, under which he held certain property, both real and personal, conveyed to him by a testator under separate contract, to be held, managed and disposed of by plaintiff for the purpose of reimbursing himself for money advanced and services performed by him for the benefit of said testator, and naming the executors of

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a residuary legatee named in said testator's will as defendants, states a cause of action for equitable cognizance in the circuit court, and the jurisdiction to take the accounting does not reside in the probate court.

2. ____: ____: ____: **Converse of Proposition.** The probate court has no jurisdiction to entertain a petition filed by executors under a will, asking for a decree declaring that an absolute conveyance made by testator be adjudged an equitable mortgage, and that the grantee be required to account for his stewardship as trustee thereunder; and the converse of said proposition, were the situation of the parties reversed, must be true.
3. ____: **Of Probate Court: Equitable Matters: Accounting.** The probate court is not a court of general equitable jurisdiction, although it may, like other courts of law, consider and determine questions of an equitable nature incident to the exercise of its statutory jurisdiction. It may settle the accounts of executors and administrators made by them in the performance of their duties as such, but not their accounts involved in transactions in other capacities, whether as trustees or as individuals.
4. ____: ____: **Death of Beneficiary of Trust: Trustee Named as Executor.** Plaintiff was a surety on the bond of a guardian, and upon his default paid a large sum of money for him, and by way of reimbursement the guardian conveyed to him certain real estate, whereupon he promised the guardian that he would return to him whatever he could save above the debt he had been required to pay and the cost of maintenance and compensation for his service. For six years he administered the trust, after which the guardian died leaving a will in which plaintiff was appointed executor and two other persons were designated as residuary legatees. One of these persons assigned his interest to the other, and died leaving a will in which he named a third person as legatee and appointing two of the defendants as executors. The trustee sues in his individual capacity for an accounting of the trust estate, naming the surviving legatee under the guardian's will and the executors under the other legatee's will as defendants. *Held*, that the death of the guardian had no effect upon the plaintiff's rights or duties under the terms of the trust, although he himself was the beneficiary holding and managing the property for the purpose of paying a debt due him from the guardian, and he was subsequently named by the guardian as executor of his will, and two of the defendants are executors of the will of one of the residuary legatees named in the guardian's will. The probate court has no jurisdiction to settle the account pertaining to the trust estate, but it is one of equitable cognizance in the circuit court, since the account pertains to the execution of the trust, and not to the execution of the guardian's will or the will of said residuary legatee, neither of whom had power by will to change the terms of the trust.

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5. **TRUSTEE: Compensation for Services.** For services rendered by a trustee under a trust which had its origin in a contract made by the testator under a will naming the trustee executor, no compensation can be allowed to him as executor.
6. **PLEADING: Demurrer: Exhibits.** In determining whether the petition states a cause of action exhibits attached to the petition constitute no part of the petition.
7. **TRUST ESTATE: Equitable Mortgage: Trustee as Executor: Listed in Inventory: Title.** The fact that the trustee under a contract by which certain real estate was conveyed to him to reimburse him for moneys paid for the grantor, inventoried, as a part of the grantor's estate, a residuary interest in all the unsold property, upon his qualification as executor under the grantor's will, which named certain persons as residuary legatees, did not affect either the existence or character of the trust, or amount to a transfer of the fee.

Appeal from St. Louis City Circuit Court.—*Hon. Wilson A. Taylor, Judge.*

REVERSED AND REMANDED.

P. A. Griswold for appellant.

(1) This case is within the jurisdiction of the circuit court. Sec. 22, art. 6, Constitution; Secs. 1727, 1794, 2535, R. S. 1909; *Santer v. Leveridge*, 103 Mo. 622; *State v. Dearing*, 180 Mo. 64; *Hope v. Blair*, 105 Mo. 92; *McQuillin's Missouri Practice*, sec. 206. (2) The probate court has no jurisdiction to determine the title to property. Sec. 34, art. 6, Constitution; Sec. 4056, R. S. 1909; *In re Estate of Strom*, 213 Mo. 6; *State v. Bird*, 253 Mo. 579; *In re Wood Estate*, 138 Mo. App. 262; *2 Woerner's Am. Law of Administration*, p. 1033.

Edwin S. Puller and Watts, Gentry & Lee for respondents.

(1) The demurrer to plaintiff's amended petition was properly sustained. It shows that plaintiff was then acting as executor under the will of Alexander Largue and that his administration had not been completed; nor had his final settlement been approved. The jurisdiction

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of plaintiff's accounts is vested in the probate court. Plaintiff voluntarily submitted himself to such jurisdiction when he qualified as executor and continued to act as such for eleven years, from 1906 down to this date. He cannot now be heard to assert that the probate court has no jurisdiction. Constitution, art. 6, sec. 34; R. S. 1909, sec. 4056. (2) The title to the real estate mentioned in this suit is not in question. Johnston, as executor, inventoried the real estate in the probate court as the property of Alexander Largue. The equitable title thereto immediately vested in Largue's devisees under his will, L. Anna Grice and John Grice. There are no adverse claimants and no adverse claim has ever been asserted as to either the real or personal property by anyone. Plaintiff's petition shows that Largue, by his will of which plaintiff is executor, devised and bequeathed all his real and personal property to L. Anna Grice and John Grice; that John Grice transferred his interest to Mathilde Largue; that Mathilde Largue by her will named Mathilde Puller as her residuary legatee and devisee. These claimants are not adverse and no adverse claimant has ever appeared. The sole issue in this case is whether Johnston is entitled to excessive commissions, charges and expenses in his dual capacity as "trustee" and as executor. In certain instances he claims fifteen per cent commissions as "trustee" and also five per cent commissions as executor on the same items. He has hopelessly commingled his accounts as trustee and as executor. He now denies the jurisdiction of the probate court over his accounts as executor, in the hope that the circuit court will allow him commissions as trustee in excess of the amount which the probate court, under the law, would allow him as executor. (3) Plaintiff claims double commissions as trustee and as executor. *Judson v. Bennett*, 233 Mo. 607.

BROWN, C.—The amended petition was filed April 3, 1914, against L. Anna Grice and Mathilde A. Puller in their personal capacity, and William B. Thompson and Edwin S. Puller as executors of the will of Mathilde Largue, deceased. The averments, so far as they are

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important to the questions here, are that Alexander Largue was guardian of two infants, and plaintiff, at his solicitation, was on his bond; in the year 1900 Largue was, by the probate court of the city of St. Louis, in which the guardianship was pending, removed, and William B. Thompson appointed in his stead; that he was found to be in default in his accounts \$8,324.16, which the plaintiff was compelled to and did pay as his surety, in consideration for which Largue transferred and conveyed to him three notes, two of which were secured by deeds of trust on separate tracts of land in St. Louis County, together with five pieces of real estate in the city of St. Louis. The two deeds of trust were foreclosed, and plaintiff became the purchaser.

While these transfers and conveyances were absolute, the plaintiff afterwards voluntarily promised Largue "that if he could save anything out of said property after payment of said liability and the cost of administering said estate, including a charge for his services, he would return same" to him.

Largue died on October 6, 1906, leaving a will in which John Grice and Anna Grice were made the residuary legatees, and plaintiff the executor. Plaintiff qualified, and inventoried, as a part of the estate, a residuary interest in all the said real estate remaining unsold. John Grice died in 1908, having assigned his interest in the estate to Mathilde Largue, and leaving a will in which defendant Mathilde Puller is named as residuary legatee, and defendants William B. Thompson and Edwin S. Puller as executors.

Plaintiff took charge of said property in 1900 and administered it for thirteen years, selling portions thereof, and applying the proceeds to the liability for which he held it, collecting rents, paying taxes and interest, for repairs and the costs and expenses of prosecuting and defending suits, and for commissions on sales and loans negotiated on the property, for all of which he has charged in the account exhibited in connection with his petition \$2,142.22 as compensation, and alleges that there still remained in his hands the sum of \$1,174.53,

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and three pieces of the real estate to which he still holds the title subject to a deed of trust for \$2,000 and interest thereon.

The petition further states, in substance, that plaintiff has filed in the probate court his final settlement as executor of the estate of Alexander Largue in which he has charged himself with said sum of \$1,174.42, and that the defendant executors have filed exceptions thereto, claiming that they ought to have the further sum of about \$2,000 in addition thereto. That each of the defendants Grice and Puller claims an interest in the remaining lands, the exact nature and extent of which plaintiff does not know, and that the defendant executors claim an interest in the said cash balance in his hands.

The prayer for equitable relief is as follows:

"Wherefore, the premises considered, plaintiff prays the court, first, to approve plaintiff's account herein set forth and to award to plaintiff a reasonable compensation for his services in managing and caring for said property, and, second, to ascertain the parties entitled to whatever cash may remain in the hands of plaintiff out of the proceeds of the sale of said property, and their respective interests therein, and third, to ascertain and determine the parties entitled to said three pieces of real estate still held by plaintiff, and their respective interests therein, and for such further orders and relief as to the court may seem just and equitable."

To this petition the defendants, with the exception of Thompson, filed a demurrer, upon the ground that the petition does not state a cause of action, which demurrer was sustained and the plaintiff declining to plead further, judgment was entered for the defendants.

I. While the petition may be inartificial, both in its charges and its prayer, it is plain that it has for its object an accounting in the circuit court with respect to

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in Circuit
Court.** a trust under which the plaintiff held certain property, both real and personal, conveyed to him by Alexander Largue to be held, managed and disposed of for the purpose of reimbursing the trustee on account of

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money advanced and services performed for the benefit of the beneficiary. The respondents do not question this in the brief and argument before us. On the contrary, the interest which they assert is not a legal interest, but one arising in equity out of property to which the plaintiff is invested with the legal title. Their only contention is that the jurisdiction to take the accounting resides in the probate court and not in the circuit court. They are perfectly willing to admit the trust and receive its fruits.

The demurrer admits the existence of the trust so far as it is well pleaded in the petition.

Were the situation of the parties reversed, so that these defendants, as plaintiffs, were asking for a decree declaring the absolute conveyance under which plaintiff holds the property involved to be an equitable mortgage, and for an accounting of his stewardship in relation thereto, he could not interpose the defense that he should be sued in his capacity of executor and not as an individual, and the probate court would clearly have no jurisdiction over the issues. Nothing is better settled than that the probate court is not a court of equitable jurisdiction, although it may, like other courts of law, consider and determine questions of an equitable nature incident to the exercise of its statutory jurisdiction. [State ex rel. v. Bird, 253 Mo. 569.] It may settle the accounts of executors and administrators, but this refers only to such accounts as are made in the performance of their duties as such. It has no reference to their accounts involving transactions in other capacities, whether as trustees or as individuals in their business relations.

On the other hand the execution of trusts and supervision of trustees constitute a peculiar branch of equity jurisprudence and the circuit courts of this State are clothed by statute with large jurisdiction in the matter of their appointment, removal and supervision. [R. S. 1909, chap. 122.]

The plaintiff is not a testamentary trustee. His appointment and duties had no connection with any of the

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duties or powers within the jurisdiction of the probate courts as conferred by the Constitution. [Constitution, art. 6, sec. 34.] They were incident to the title of lands conveyed to him by Alexander Largue, and which are, by his admission in this pleading, subject in his hands to certain uses which are admitted by the demurrer. After he had been holding them for about six years and managing them in accordance with the trust agreement, his grantor died. His death had no effect upon either his rights or duties under the terms of the trust, because he was himself a beneficiary holding and managing the property for the purpose of paying his debt. His appointment by the grantor as executor of the will and statutory qualification thereunder had no effect upon his title or powers as trustee, but he stood in precisely the same position as if another had been appointed executor, with the exception that in that case it would have been his duty to account to the latter for the money or securities in his hands resulting from the execution of the trust, as well as to the heirs or devisees for the lands remaining, and might have an accounting in equity for that purpose, to which all these would be necessary parties, because it would involve the interests of those entitled to the real estate as well as to the personality, and determine the conditions upon which the title should be reinvested. It is evident that any adjudication would be incomplete, if not futile, unless it should reach this final conclusion of the entire matter. While the petition is indefinite, there are matters suggested in it with reference to the dealings of plaintiff with the securities held by him under the trust that might call for the serious consideration of a court of equity having jurisdiction to hear and determine them.

We are of the opinion that the matters stated in the petition are clearly cognizable in a court of equity and that they do not pertain to the execution of the will of Alexander Largue, who had no power by his testamentary act to affect the terms of the trust pleaded in this case. Although he might have made such testamentary provisions as would have called upon the plaintiff to determine whether or not he could consistently act

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as executor of the will, no such question has yet been presented in this case and we must presume that the testator, in the appointment, acted prudently, and consistently with the trust agreement existing between himself and the plaintiff.

II. The respondent seems fearful that the exercise of the jurisdiction of the circuit court in this case may result in the payment of double compensation for services performed in the capacity of trustee.

Compensation of Trustee. This subject was thoroughly discussed by this court in *Judson v. Bennett*, 233 Mo. 607, in which we said: "A person may act *under a will* in the dual capacity of executor and trustee. But he is not entitled to double commissions for some services performed in one capacity, and others performed in the other capacity, during the same period." We have taken the liberty to italicize three words because of the suggestion they contain that one person may act as *testamentary* trustee and at the same time execute the will. In this case, as we have seen, no such question arises, as the trust had its origin in a contract made six years before the death of the testator, and provided for the necessary expenditures and services incurred and rendered in its execution, and for these no compensation can be allowed as executor. As to the line of demarcation between these services we cannot now speak, as nothing but the petition is presented. It may be that the exhibit filed with it might contain some suggestions applicable to that question, but only the petition is before us, and the exhibit constitutes no part of it for the purpose of this demurrer.

III. In the decision of this case we have avoided reference to any question other than the question of jurisdiction upon the theory that a trust exists. A careful reading of the respondents' brief and argument leaves no doubt that it is not their purpose to deny this, although its terms may be questioned upon the coming in of the evidence. We do not see how the statement in the in-

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ventory can affect either its existence or character. It was the duty of the executor to show the condition of the estate both real and personal. The inventory truly stated that it was entitled to a residuary interest in this land, but this was a mere statement of fact, and did not amount to a transfer of the fee, which is still held by the plaintiff in his own right.

The judgment of the circuit court is reversed and the cause remanded for further proceedings.

Railey, C., concurs.

PER CURIAM:—The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All the judges concur; *Bond, P. J.*, in result.

J. C. W. CROUCH, Appellant, v. FREDERICK W. HOLTERMAN.

Division One, December 3, 1917.

1. **QUASHING EXECUTION: Grounds.** An execution can be quashed only on grounds that go to the integrity of the judgment, the jurisdiction of the court or defects in the process itself.
2. **—: In Ejectment: Homestead.** After judgment in an action of ejectment, in which defendant was personally served and made default, an execution, issued after the adjournment of the term and levied upon the same land, cannot be quashed on the mere ground that the premises constitute defendant's homestead. That defense was appropriate in the action of ejectment, and not having been made defendant is concluded by the judgment therein.
3. **—: —: —: As to Defendant's Wife.** But if defendant's wife was not a party to the action of ejectment, neither the judgment therein nor process issued thereon is conclusive as to her, nor are her homestead rights affected thereby, nor is she precluded by either from asserting them in a proper proceeding.

Appeal from St. Louis City Circuit Court—*Hon. W. B. Homer, Judge.*

REVERSED AND REMANDED.

Hugh D. McCorkle for appellant.

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(1) A motion to quash an execution, which does not specify any infirmity in the judgment, nor in the proceedings leading up to it, as want of jurisdiction, fraud in its obtention, nor any defect, irregularity, or insufficiency in the execution, and filed by one who was duly served with process, cannot be sustained. State to use of Bond v. Berry, 9 Mo. App. 42; Buzzard v. Robertson, 107 Mo. App. 557; Cope v. Snider, 99 Mo. App. 496. (2) Errors or irregularities preceding the rendition of a judgment will not justify the quashing of the final process issued thereon. These can only be corrected by appeal or error, and not by a collateral attack, as by a motion to quash the execution. Johnson to use v. Greve, 60 Mo. App. 170; Brackett v. Brackett, 53 Mo. 265; Adams v. Tracy, 13 Mo. App. 578; Gregory v. Gregory, 10 Mo. App. 589; Harbert v. Darden, 116 Mo. App. 516; Dubrosky v. Bingelli, 167 S. W. 999. (3) As to what issues are barred, see: Donnell v. Wright, 147 Mo. 646; Lynch v. Ry. Co., 168 S. W. 244, and Mayo v. Chiles, 11 Ky. 237. (4) As to judgment concluded from collateral attack after the term, see: Ewart v. Peniston, 233 Mo. 965, and Higgins v. Higgins, 243 Mo. 164. (5) That homestead exemption is proper defense in ejectment, see: Barton v. Walker, 165 Mo. 25, and Farra v. Quigley, 57 Mo. 284.

John B. Dempsey for respondent.

The purpose was not to attack a judgment or the sale of the fee under the execution, but to have the court declare that a homestead being established the right of shelter thereunder to the defendant and his family shall not be taken away from them. Judgment is a lien upon the land subject to the homestead right. And the deed or fee can be sold on execution subject to such right, and the purchaser has the absolute right (of possession) when the homestead right ceases. Black v. Curran, 81 U. S. 463. The sale under the execution conveyed the fee to the purchaser, but his right of possession and enjoyment must be deferred until the right of homestead ceases to exist either by abandonment or

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death, or by the execution and delivery of a conveyance to the holder of the fee title. This applies only to the defendant. As to his wife and children, exemption in the homestead is not a mere right, but a *vested estate*. Black v. Epstein, 221 Mo. 307. Homestead rights do not protect the debtor from his obligations. It only protects the homestead—the family domicile, from the debts of the head of the family. In Missouri, as in most of the States, the protection is afforded simply by excepting the homestead from general judgment liens for ordinary debts. Sec. 6704, R. S. 1909. No valid writ can be issued or executed against the favored property. The family cannot be disturbed or deprived of its home. The husband cannot by any act of his deprive his wife or children of their right of homestead. So even if it is contended that the silence of the husband when he should have claimed his homestead forfeits his right, it cannot destroy the homestead which still remains in his family. Houf v. Brown, 171 Mo. 207. And this is true as to the ejectment judgment, for the stronger reason that the wife was not made a party to the action. Tepley v. Ogle, 162 Mo. 197.

BOND, P. J.—I. In 1900 Frederick W. Holterman, the defendant herein, executed a promissory note to H. J. Holdenreid, upon which the latter afterwards obtained judgment before a justice of the peace. In 1903 said judgment was revived in the sum of \$107.37 and a transcript filed in the circuit court. Under an execution ordered and issued thereon a levy was made on certain real estate in City Block 5583 by the sheriff of the city of St. Louis, and the property was sold under said levy to J. C. W. Crouch for \$62.70. Thereafter Crouch instituted this action in ejectment against defendant Holterman for possession and damages, and defendant, though personally served with process, made default, whereupon judgment was rendered in favor of plaintiff for possession, for rents in the sum of \$39.60 and for costs. After the lapse of the term, execution issued on this judgment, directing the sheriff to oust de-

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fendant and deliver possession of the property to plaintiff. Defendant thereupon filed a motion to quash the execution, claiming that said premises constituted his homestead and as such were exempt from levy and sale under execution.

The motion was sustained on the theory that the premises were the homestead of defendant Holterman and that the judgment for possession in ejectment was void. Plaintiff appealed to the St. Louis Court of Appeals.

When the cause was argued before the Court of Appeals no question was raised as to its jurisdiction, but that court, upon taking the case up for consideration, held that as the motion to quash had been filed in an action of ejectment, it had no jurisdiction and transferred the cause to this court for final determination.

II. It appears that the motion to quash the execution filed by defendant fails to specify any infirmity in the judgment or prior proceedings or any defect or

imperfection on the face of the process of execution. It was not in terms or by intent ^{Quashing Execution.} a proceeding to set aside the judgment

for any ground on which a bill in equity might be sustained. It is simply a motion by defendant in an execution following a judgment in an action of ejectment wherein he was personally served with process to set aside the execution for a matter of defense which he might have interposed in the action of ejectment. [Barton v. Walker, 165 Mo. 25; Farra v. Quigly, 57 Mo. 284.] In these two cases the defense of homestead exemption was interposed in an action of ejectment. In the present case the defendant did not make any defense to the suit in ejectment, but after execution, sought to quash the execution on the judgment against him on the ground that he was a homesteader. All defenses which he might have interposed prior to the judgment in ejectment are concluded by that judgment, since it was not appealed from, leaving the defendant therein only the right to quash

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the execution upon proper grounds which are, in substance, any which go to the integrity of the judgment, the jurisdiction of the court or defects in the process itself. [Buzzard v. Robertson, 107 Mo. App. 557; State to use v. Berry, 9 Mo. App. 42.]

As far as the defendant is concerned the judgment is conclusive as to the matters relied on in the motion to quash, although not conclusive against his wife, for she was not a party to the judgment nor any of the proceedings upon which it was based. Nor are her homestead rights precluded by judgment nor subject to deprivation through process issued thereunder, and she may assert them in any proper proceeding.

It necessarily follows that the action of the trial court in this case, sustaining the motion to quash filed by defendant, in the ejectment suit, was erroneous. It is therefore reversed and the cause remanded for such other proceedings as the parties may see fit to take. All concur, except *Woodson, J.*, who dissents.

J. V. DENNY et al. v. JEFFERSON COUNTY et al.,
Appellants.

Division One, December 3, 1917.

1. **COUNTY DEPOSITARY: Rejection of Best Bid.** A selection of the lowest of two bidders to become county depositary, which is the result of bad faith, partiality and favoritism on the part of the county court, each bidder being solvent, doing a safe and lawful banking business and of good reputation, is against the best interests of the taxpayers, illegal, and fraudulent within the meaning of the law.
2. **—: —: Trust Company: Doing General Banking Business.** The powers of a trust company embrace the whole field of legitimate banking, with the one exception of receiving money on deposit without the payment of interest; and if it uniformly pays interest on deposits and otherwise observes legal prescriptions, the county court is not justified in rejecting its bid to become the county depositary on the sole ground that it is engaged in a general banking business.
3. **—: —: —: Loaning Money to Director.** A loan of money by a trust company to one of its officers or directors in ex-

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- cess of ten per cent of its capital stock and surplus is not illegal if approved by a majority of the other directors.
4. _____: _____: **Discretion of County Court: Good Faith.** The county court, in determining which is the best bid made by banking institutions to be selected as county depositary, does not exercise judicial discretion, but is a mere administrative agency of the county; and while its official acts carry with them the presumption that it has done its duty, the presumption applies only to acts within its administrative powers done in pursuance of the legislative purpose, and if the power depends on specific facts their existence may always be controverted, and in so far as it is founded on the exercise of judgment it must be exercised in good faith, reasonably and with regard to the legislative purpose.
5. _____: _____: _____: **Proviso to Statute: Power to Reject All Bids.** The purpose of the statute authorizing the county court to contract with a banking institution for the deposit of county funds (Sec. 3805, R. S. 1909) is to obtain for the public the largest available income from those funds, consistent with their safety and ample security; and the purpose of the proviso, giving to the court the "right to reject any and all bids," was not to give to the court the power to do whatever it might desire to do, but to save from defeat the legislative purpose by preventing combinations of bidders and a division of the funds among themselves in accordance with private agreements, and for use in many other ways in safeguarding the funds; it cannot be used to thwart the legislative purpose and the exercise of good faith which the statute imposes.
6. _____: **Judgment: Awarding Funds to Unsuccessful Bidder.** In an injunction brought by taxpaying citizens to set aside an order of the county court designating the lowest of two equally solvent and competent bidders as the county depositary, and to restrain the county treasurer from depositing the county funds with such bidder, in which neither the State nor any of its prosecuting officers intervene, the circuit court can, for good grounds established, set aside the order and cancel the consequent contract entered into by the county court in pursuance thereto, but having done so it cannot go further and designate the other bidder as county depositary and award to it the county funds.

Appeal from Jefferson Circuit Court.—*Hon. E. M. Dearing, Judge.*

REVERSED (*in part*) AND REMANDED.

R. E. Kleinschmidt, H. B. Irwin and Ernest A. Green for appellants.

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(1) Every presumption is in favor of the county court acting from proper and right motives and the burden is upon the plaintiff to overthrow such presumption by a greater weight or preponderance of the evidence. Beardon v. Miller, 54 Mo. App. 201; State ex rel. v. Flemming, 147 Mo. 10; Martin v. Stoller, 107 Mo. 317; State v. Brown, 75 Mo. 317; State ex rel. v. Weatherby, 45 Mo. 17; Agan v. Shannon, 103 Mo. 661. (2) *Quo warranto* would lie to declare a forfeiture of the Trust Company's charter for misuser and nonuser of its franchise, in doing a general banking business instead of a trust company business, in loaning money without real estate or collateral security and in paying no interest on daily balances. Secs. 1124, 2631, R. S. 1909; State ex inf. v. Oil Co., 218 Mo. 1; 32 Cyc. 427; State ex rel. v. Social Club, 169 Mo. App. 149; State ex inf. v. Jockey Club, 200 Mo. 51; State v. Trust Co., 144 Mo. 562. (3) The statute authorized the county court to exercise its reasonable discretionary powers. The county court did exercise a reasonable and wise discretion and, under such circumstances, the court will not interfere by mandamus, injunction, prohibition or in any other manner. State ex rel. v. Hawkins, 130 Mo. App. 41; State ex rel. v. Gregory, 83 Mo. 137; State ex rel. v. Fort, 180 Mo. 108; High on Extra. Leg. Rem., secs. 24, 92, 94; Mechem on Pub. Officers, sec. 991. (4) Where discretion is vested in a public officer the courts will not direct how it shall be executed or what conclusion or judgment shall be reached. State ex rel. v. Jones, 155 Mo. 576; State ex rel. v. McGrath, 91 Mo. 386; State ex rel. v. Francis, 95 Mo. 44; State ex rel. v. Harris, 176 S. W. 9. (5) The fact that the successful bidder must file a bond for the faithful performance of its duty does not deprive the county court of a discretionary power or preclude it from rejecting any bid, and the court may, in its discretion, make the award to the lowest bidder to avoid litigation. State ex rel. v. Hawkins, 130 Mo. App. 41; Commonwealth v. Smith, 92 Pa. St. 349; People v. Dorsheimer, 55 How. Pr. 118. (6) The cir-

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cuit court has no authority to select a depositary. It can only direct the county court as to its duties in making the selection. State ex rel. v. Harris, 176 S. W. 9; Sec. 3805, R. S. 1909.

Clyde Williams for respondents.

(1) Powers and management and control of banks and trust companies. Secs. 1094, 1124, 1098, 1099, 1129, 1125, 1106, 1132, 1111, 1126, 1131, 3002, 3003, 3004, 3006, 9972, 10001, R. S. 1909; Laws 1911, p. 151; Bank v. Hill, 148 Mo. 380; Bank v. Leyser, 116 Mo. 51; Muth v. Trust Co., 88 Mo. App. 596; State ex rel. v. Trust Co., 144 Mo. 562; Stone v. Trust Co., 150 Mo. App. 331. (2) The duty of the county court in the selection of a depositary. Secs. 3729, 3803-3805, 3813, 10886, R. S. 1909; Reagan v. County Court, 226 Mo. 79; Barrett v. Stoddard County, 246 Mo. 501; State ex rel. v. Hawkins, 130 Mo. App. 41; State ex rel. v. Bourne, 151 Mo. App. 104; State ex rel. v. Public School, 134 Mo. 306; State ex rel. v. Adcock, 206 Mo. 556; State ex rel. v. Roach, 230 Mo. 446.

BROWN, C.—This is an injunction suit brought by 450 taxpaying citizens of Jefferson County to set aside an order of its county court designating the Bank of Hillsboro as depositary of the county funds, and to enjoin the county treasurer from depositing such funds or the district or capital school funds thereof in said bank under and by virtue of such order, and to require him to withdraw all such funds as may have by him been deposited in said bank, and to restrain the county court and judges thereof from further recognizing such order, and to require the court to accept the bid of the Jefferson Trust Company, or proceed under the statute to select some depositary of such funds.

The petition states that the county court caused due notice to be given that sealed proposals would be received by it at its May term, 1913, until noon of the first day of said term, from banking corporations, as-

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sociations or individual bankers in said county, for the deposit of the county funds for the two years next ensuing after the date of such proposals, and that for the purpose of letting said funds the court divided them into two equal parts. That there were, on the date named in the notice, two bids accompanied by the deposit required by law, one from the Jefferson Trust Company, offering to pay three and one-fourth per cent per annum upon daily balances upon all the funds, and two and three-fourths per cent on one-half the funds should one-half be awarded it; also one bid from the Bank of Hillsboro offering to pay two per cent on daily balances for all the funds. That the county court selected the Bank of Hillsboro as the depositary. It states that the county court gave no consideration to the bids of the Jefferson Trust Company, and took an insufficient bond from the Bank of Hillsboro; that in making its award and approving the bond the court did not act in good faith and with due regard of the best interests of Jefferson County and was actuated and controlled by improper motives. That the injury is irreparable and no adequate remedy exists at law. All this is set out with much detail. The cause was tried on an amended answer which denies generally and specifically the allegations of the petition and states that the Bank of Hillsboro was selected because it was safer, sounder and more responsible and reliable than the Jefferson Trust Company, and that the selection of the Bank of Hillsboro as the depositary was in good faith, without partiality, prejudice or favoritism, and with due regard for the best interests and welfare of Jefferson County and its taxpayers. It also alleged that the Jefferson Trust Company, while incorporated as a trust company, was doing a general banking business, and was guilty of such misuser and non-user of its corporate franchises as to render it unsafe as a depositary of the public funds. The testimony showed that both corporations were of good reputation and solvent. The two judges of the county court who testified in the cause testified freely to those facts.

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Certain business acts and practices on the part of the Trust Company were shown in evidence, which are alleged by appellants to be improper and in violation of its charter. These will be noticed under the proper heads in the opinion.

One of the county judges did not testify. The others were present and upon the stand and failed to testify that they knew or believed anything derogatory to the character and financial soundness of the Jefferson Trust Company. One of them testified that he came to the court, on the morning bids were received, ignorant as to who the bidders would be. He did not vote because the other judges voted for the Bank of Hillsboro. Had it been necessary he would have voted the same way. The Presiding Judge had been a stockholder, director and vice-president of the bank when he was elected as judge for the term beginning January 1, 1911, soon after which he sold his stock and resigned as vice-president and director. One of the reasons he gave for voting for the Bank of Hillsboro was that it had always taken care of the warrants when the money was not immediately available in the funds upon which they were drawn. Mr. Williams said that the Presiding Judge (Winer) had told him that he had promised Mr. Donnell, one of the directors of the Bank of Hillsboro, before the election, to give him the money. Judge Winer denied this by saying, "If Mr. Williams says so, I might have done it." Mr. Kidd testified that Judge Winer advised him not to take stock in the Jefferson Trust Company, saying, "It was a Republican scheme, and damned if they could fool him for a moment." George Russel testified that in speaking of his action in awarding the funds to the Bank of Hillsboro, Winer said: "If you ever expect the Republicans to elect you to office, you are left; they will never do it." Other similar statements were in evidence, none of which were denied by Judge Winer. Judge Kerckhoff, the other member of the court, although a defendant, did not testify. The district and capital school funds, not at the disposition of the county

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except to loan, amounted to \$50,000. The findings and judgment of the court are as follows:

"Now this day come the parties, plaintiffs and defendants, both in person and by attorney, and submit this cause to the court upon the pleadings and proof adduced, and the court being fully advised doth find that at the May term, 1913, of the county court of Jefferson County, Missouri, said county court advertised for bids, as by law provided and required, for the deposit of all the funds belonging to said county for the purpose of selecting a county depositary; that as a result of said advertisement the Bank of Hillsboro, a banking corporation, filed its bids to become the depositary, and its bid was two per cent per annum on daily balances; that the Jefferson Trust Company, a corporation doing a general business, also bid to become the depositary for the funds of said county and its bid was three and one-quarter per cent per annum on daily balances; that no other bid or bids were made; that on the same day the bids were filed they were opened by the county court and the award was then and there let to the Bank of Hillsboro, the lowest bidder; that the Bank of Hillsboro was a solvent institution and its business methods safe and sound; that the Jefferson Trust Company was solvent, its management in the hands of reputable and responsible men, its business methods were safe and sound, and its bid to become the depositary was materially higher than the bid of its only competitor, the Bank of Hillsboro; that both the Bank of Hillsboro and the Jefferson Trust Company are conveniently located for a depositary of the county, both secured against burglary losses, both equally well equipped and equally well managed as banking institutions; that this action was brought by fifty and more reputable, responsible resident taxpaying citizens of said Jefferson County; that the action of the county court in the selection of the depositary was the result of bad faith, partiality and favoritism on the part of said county court, and against the best interest of the taxpayers of Jefferson County; that the action of said

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court was illegal, without authority of law or warrant of facts and was fraudulent within the meaning of the law; that the contract entered into by the county court with the Bank of Hillsboro in selecting it as the depositary under the law and the facts is a fraud on the petitioners and the taxpayers of the county; wherefore, the court finds all the issues for the plaintiffs and that petitioners are entitled to the relief prayed for in their petition.

"It is, therefore, ordered and adjudged by this court that the order of the county court awarding and designating the Bank of Hillsboro as depositary be set aside and for naught held; that the county court of Jefferson County select and designate the Jefferson Trust Company of Jefferson County, Missouri, as the depositary, for the county funds, in pursuance to its bid to pay three and one-quarter per cent on daily balances on all money belonging to said county, and that it accept from the said Jefferson Trust Company and approve a good and sufficient bond in the amount required by said court for the faithful performance of its duties as depositary for said county, with the proper conditions, and that upon compliance with the judgment herein, the funds of said county be immediately paid over and deposited in the said Jefferson Trust Company as the depositary for said funds of said county. It is further ordered that the defendant, the Bank of Hillsboro, transfer said funds in its possession to the Treasurer of Jefferson County, or upon the order of the county court of said county."

I. This action is brought with special reference to the provision of section 3729, Revised Statutes 1909,

by 450 resident, solvent and responsible

County Depositary: taxpaying citizens of Jefferson County.

Unwarranted Selection. It is directed against the contract by which

the county court of that county at its May term, 1913, selected the Hillsboro Bank as

the depositary of the county funds during the succeeding two years. It is asserted by the petitioners and

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found by the court in its judgment that the act complained of was the result of bad faith, partiality and favoritism on the part of the court, and against the best interest of the taxpayers of Jefferson County, and was illegal, without authority of law or warrant of facts, and was fraudulent within the meaning of the law, and adjudged that the order of the court designating the Bank of Hillsboro as the depositary in consideration of the payment of two per cent interest on daily balances be set aside and the Jefferson Trust Company be designated as the depositary in pursuance of its bid to pay three and one-fourth per cent. The Jefferson Trust Company and the Bank of Hillsboro were the only bidders.

We think that the finding of the court as we have stated it was fully justified by the evidence. The members of the county court, both by their statements as witnesses and by their silence, demonstrated to the trial court that in the action complained of they took no cognizance of the public good, that they neither considered nor discussed the effect of their action in connection with the public welfare, nor investigated rumors and facts which, by an afterthought, they now present in justification. On the other hand, the judges who have testified established by their own word the solvency and suitability of the unsuccessful bidder with respect to its resources and management. The ability of its directors to respond to the stringent liability which the law imposes upon them was also well established.

II. The first point in logical order presented by the appellants is that the bid of the Jefferson Trust Company should have been rejected, because, as a matter of fact, as shown in this proceeding, that institution was acting in excess of the powers

Trust Company: Doing Banking Business. granted it by its charter: (1) by receiving deposits payable on demand without interest, and (2) by loaning its trust funds without real estate, collateral or other security. It is not denied that it has the power under its

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charter to enter into the statutory contract as depositary of the county funds, but to use the language of the brief, "*quo warranto* would lie to declare a forfeiture of the Trust Company's charter for misuser and non-user of its franchise, in doing a general banking business," which it is alleged to have been doing in the petition.

In 1907 the Legislature had the whole subject of banking before it and treated it in a single act repealing the following articles of Chapter 12, Revised Statutes 1899, and enacting new articles in lieu thereof: Article VIII, entitled "Banks of Deposit and Discount;" Article XII, entitled, "Trust Companies," and Article XIII, entitled, "Savings and Safe Deposit Institutions," together with all acts amendatory thereof, and enacting three new articles, with the same titles, covering the same matter, in lieu thereof, and amending Article XX, entitled "State Banking Department." [Laws 1907, p. 124.] These articles were evidently intended to cover everything connected with the banking business of the State subject to State jurisdiction and control, and are substantially continued in the Revised Statutes of 1909. This law gave the State Banking Department charge of the execution of the laws relating to banks, private banks and bankers, trust companies and savings and safe deposit companies, and the *banking business in the State*. In the provisions relating to each of these institutions their powers are entwined in a manner that indicates clearly the common ground covered by all. It was made the duty of the examiner (R. S. 1909, sec. 1080) "to visit and examine every bank, private banker and trust company receiving deposits, except national banks, and every savings and safe-deposit company." It was also provided that "for the purposes of this section each such institution and private banker are hereby denominated banks." Thus the popular habit of designating the places in which these institutions received deposits as "banks" received legislative endorsement. In the article concerning banks of deposit and discount, banks

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and trust companies were indiscriminately included. For instance, in Section 1099 it is provided that every person who shall be elected director of a bank or trust company shall qualify within thirty days or forfeit the office. Section 1094 provides with reference to banks of deposit and discount that they "shall be authorized and empowered to conduct the business of receiving money on deposit and allowing interest thereon, and of buying and selling exchange, . . . of loaning money upon real estate or personal property, and upon collateral and personal securities, at a rate of interest not exceeding that allowed by law, and also of buying, selling and discounting negotiable and non-negotiable paper of all kinds, as well as all kinds of commercial paper." Trust companies are authorized "to receive money in trust and to accumulate the same at such rate of interest as may be obtained or agreed upon, or to allow such interest thereon as may be agreed," and to do the other things which we have mentioned as being within the powers of the banks of deposit and discount, as well as many other things not so included. [R. S. 1909, sec. 1124.] Section 1125, which appeared for the first time as Section 2 of the article relating to trust companies in the Act of 1907, provided as follows: "Every trust company now organized, or which may be hereafter organized shall at all times have an amount of cash on hand and cash due from banks and other trust companies equal to at least fifteen per centum of the aggregate amount of its demand deposits." The same provision as to banks of deposit and discount appears in Section 1098.

While banks of deposit and discount were empowered to receive money on deposit and to allow interest thereon, the trust companies were empowered to receive money *in trust* and to allow such interest thereon as may be agreed. These two propositions were before this court in *State ex inf. v. Lincoln Trust Company*, 144 Mo. 562, in which it was held that while the power quoted gave to the bank of deposit and discount the right to charge interest or not on its deposits the trust company could only receive deposits upon which it should

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agree to pay interest. The use of the words "in trust" instead of the words "on deposit," as in Section 1094, was considered important as differentiating the two transactions. But as was said by BOND, J., in *Muth v. St Louis Trust Co.*, 88 Mo. App. 596, 602; "There seems to be no legal obstacle to the exercise by trust companies of all the functions of ordinary banks as to receiving and paying out deposits of money, provided a rate of interest, however small, is allowed upon the sums so received." [Stone v. Trust Co., 150 Mo. App. 331, 342; *State ex inf. v. Lincoln Trust Co.*, *supra*.] The money deposited in either case becomes a part of the assets of the institution as a necessary result of the transaction. This was recognized in the Act of 1907 (R. S. 1909, sec. 1125), where it was plainly labeled to that effect in the following words: "Every trust company now organized, or which may be hereafter organized, shall at all times have an amount of cash on hand and cash due from banks and other trust companies equal to at least fifteen per centum of the aggregate amount of its demand deposits." Section 1124 confers upon them the right to buy and sell all kinds of negotiable and non-negotiable paper, and Section 1127 provides that the Bank Commissioner have "and exercise the same supervision, authority and power over all trust companies, as he is now authorized to have and exercise over trust companies which receive deposits."

Their powers cover practically the whole field of legitimate banking, with the exception of receiving money on deposit without the payment of interest. They are sufficient to render innocuous the statement that the Jefferson Trust Company was doing a general banking business. It raises no inference that it was exceeding its charter powers. Nor do we think that the evidence is sufficient to prove that at the time of the letting in question or afterward the company was engaged in handling deposits without the payment of interest. A general order was made by its board of directors on December 19, 1911, fixing the rate of interest on

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all deposits at one and one-fourth per cent. This, the secretary testified, had been paid on all accounts closed since that time. If there had been any delinquency in this respect the Bank Examiner does not seem to have noticed it. Had he thought proper to do so, and that the practice of the company required such a course, it was his duty to report it to the Commissioner, who in turn might have brought it to the attention of the Attorney-General, within whose province it was to see that proper proceedings were instituted to see that the practice was discontinued. [State ex inf. v. Trust Co., *supra*.]

Of the loans complained of the most important is a loan of \$8,000 made to one Pounds, to pay for a farm purchased by him from Doctor Denny, the president of the company. The amount was advanced upon a note of Pounds to Denny, secured by deed of trust upon the land, and indorsed by Denny to the bank. The transaction was approved by the directors. The safety of the loan does not seem to be questioned, but its legality is attacked on the ground that it was excessive, and incidentally a question is made as to whether it was a loan to Denny or Pounds, or a purchase of the note with its security. If it was made to Denny, it would seem to come within the following provision of Section 1131, Revised Statutes 1909, to which it has been carried intact from the Act of 1907; "No director or officer of a trust company in this State receiving deposits shall be permitted to borrow any of the money of the trust company in which he is a director or officer in excess of ten per centum of the paid-up capital and surplus without the consent of a majority of the directors of the trust company, other than the borrower, first having been obtained in a regular meeting of the board, said consent to be made a matter of record before the loan is made." Although the only consent proven is a general one, it does not seem to be questioned in the briefs of counsel that it was given in time and manner prescribed by the statute, and we will therefore presume that it was. This provision seems unlimited in its scope, and to permit the loan of the entire

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capital to an officer of the company, provided only that its terms are complied with. The appellants do not claim that it was a loan to Pounds. If we consider it as a purchase of the note from Denny, which is the form of the transaction, and we think its substance, it comes directly within the power conferred by Section 1124, which authorizes the corporation "to buy . . . all kinds of negotiable and non-negotiable paper."

Another class of transactions complained of consists of certain notes to the secretary, Mr. Dietrich, and by him transferred by indorsement without recourse to the Trust Company. This transaction seems also to be covered by the same provision of Section 1124, which we have already quoted.

In this connection one of the appellants' witnesses, Mr. Nichols, vice-president of the American Trust Company of St. Louis, testified that the method employed by his company and the other trust companies of St. Louis and elsewhere in handling loans is that the borrower executes the note to himself and thereupon indorses it and hands it to the cashier who gives him the money. While this testimony is not applicable or competent in this case, it was placed before the trial court and before us without objection, and we refer to it to show that it has not been overlooked.

We have no doubt that the transactions of the Jefferson Trust Company to which we have referred come directly within the power to buy all kinds of negotiable paper. They appear to have been sanctioned by the Banking Department of the State, and do not appear from the testimony to have been improvident or to have resulted in loss. Nor do they appear to have been considered by the county court in making the award in question.

III. Whether or not the county court acted within its discretionary power in awarding this contract involves consideration of the statute under which it acted.

It is not contended that its discretion was **Power to Reject Bids.** judicial in character, that is to say, such discretion as is possessed by courts whose

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jurisdiction is founded upon notice and opportunity to be heard. The county court, notwithstanding its name, is, in this matter, merely an administrative agency of the county, possessing this power in common with the township boards. [R. S. 1909, sec. 3803.] As in case of all public officers, its official acts carry with them the presumption that it has done its duty, until the contrary is made to appear. But this presumption only applies to acts within its administrative powers done in pursuance of the legislative purpose. Where this power depends upon specific facts, their existence may always be controverted, and in so far as it is founded upon the exercise of judgment it must be exercised in good faith, reasonably and with regard to the legislative purpose.

The purpose indicated in this act is plain, and well expressed in the simple provision of Section 3805 that "it shall be the duty of the county court . . . to publicly open said bids, and cause each bid to be entered upon the records of the court, and to select as the depositaries of the county funds, district school funds and capital funds, not otherwise invested according to law, the banking corporations, associations or individual bankers whose bids respectively made for one or more of said parts of said funds shall in the aggregate constitute the largest offer for the payment of interest per annum for said funds. *Provided*, that the court shall have the right to reject any and all bids." It goes without saying that the purpose of this law is to obtain for the public the largest available income from its funds. Their safety in the hands of the depositary is required to be safeguarded by ample security in addition to the responsibility of the bank, and it cannot be possible that the Legislature intended to revoke its simple and peremptory command, and by this proviso to substitute a power in the county court to do whatever it might desire to do. The meaning of the proviso is plain. It means that whenever, in order to obtain the highest rate of interest reasonably available, it becomes necessary, in the judgment of the county court, to reject any and all bids on the whole or any part of the funds, it may do so. Its

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obvious utility is to save from defeat the purpose of the law by preventing combinations of bidders by which the funds are divided and the bids determined by agreement among bankers. For this purpose it goes hand in hand with the provision for readvertising for bids, and has proved a healthy measure. This discretion may also be of use in many ways affecting the safety or availability of the funds. [Reagan v. County Court, 226 Mo. 79; Barrett v. Stoddard County, 246 Mo. 501; State ex rel. v. Hawkins, 130 Mo. App. 41; State ex rel. v. Harris, 176 S. W. 9.] But it can never be permitted to substitute a purpose of the court for the expressed purpose of the Legislature, and must always be exercised "in good faith . . . and with due regard for the best interest of the county." As we have already stated, we see no reason for interfering with the finding of the court in this respect, and it follows that the award of the county court was properly set aside.

IV. The judgment in this case must stand entirely upon the provisions of the statute under which the proceeding was instituted and must be maintained. That statute (Sec. 3729, R. S. 1909) prescribes the duty and power of the circuit court as follows: "The **Judgment.** circuit court shall make a full investigation of the matters alleged, and shall have power to set aside, reform or cause to be enforced any such contract, or any extension of any such contract, as the court shall deem best under the law and the facts." The subject of the statute is declared by the same section to be "any contract made and entered into by the county court of the county, with any person or corporation, affecting or concerning any public buildings, lands, moneys or property of the county in any manner whatever." The action in favor of these plaintiffs, without the intervention of the State or any prosecuting officers of the State, is purely statutory, depending upon the statute for the right of the plaintiffs to sue and for the remedy to which they are entitled. The only contract in-

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volved is the contract of the county made through the agency of the county court by the acceptance of the bid of the Bank of Hillsboro and constituting it the depositary of the public funds in consideration of the rate of interest specified. The power of the circuit court is limited to setting aside, reforming or causing to be enforced that contract, and it had no right by mandamus or mandatory injunction *in this proceeding* to compel the county court to make another contract with another person or corporation. State ex rel. v. Harris, *supra.*] It follows that the judgment of the circuit court in so far it sets aside the order of the county court awarding and designating the Bank of Hillsboro as depositary of the funds to which it relates, is affirmed. In so far as it orders the county court to award and designate the Jefferson Trust Company as depositary for such funds, it is reversed.

The cause is remanded to the circuit court for Jefferson County for final disposition in accordance with this judgment.

Railey, C., concurs.

PER CURIAM.—The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All the judges concur; *Woodson, J.*, in the result.

JACOB REHM v. EMIL G. ALBER et al.; HIRAM H. and PEARL E. SEVERANCE, Appellants.

Division One, December 3, 1917.

1. **MORTGAGE: To Defeat Execution: Fraud.** The facts in this case show that the deed of trust held by plaintiff and subsequently released by him, was executed by the mortgagor to defeat execution under a judgment obtained by defendants on a debt due from him to them.
2. **—: To Secure Former Gift.** A deed of trust given to plaintiff by the husband of his only child, in an attempted payment for a lot, which had previously been given to the husband, with no intention of receiving any consideration therefor, and made and placed upon record with the intention of placing the lot beyond the reach of the mortgagor's existing creditors, is fraudulent.

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3. _____: Release: Reinstatement After Sale Under Execution: Notice. A purchaser at execution sale, without actual notice of any outstanding title or claim, gets title through his sheriff's deed as against the mortgagee who, having received a warranty deed in consideration of a cancellation of the debt, by mistake previously released the deed of trust on the margin of its record, at a time when the judgment was a subsisting lien on the property.
4. _____: _____: _____: Notice at Date of Purchase. In August defendants brought suit against the mortgagor in a deed of trust, who was plaintiff's son-in-law, and who in September made a deed of trust to secure a note for \$1,000 made payable to plaintiff. In April judgment was obtained, and in June the mortgagor conveyed the lot to plaintiff by warranty deed, reciting as its consideration the surrender of the note, and the next day the deed was recorded and plaintiff entered satisfaction of the deed of trust on the margin of the record, now claiming that he made the release in ignorance of the fact that said judgment was a lien on the property. Two years later execution was issued and levied and defendants became the purchasers and received a sheriff's deed. Plaintiff asks that the release and warranty deed be canceled, and the deed of trust be reinstated and declared a prior lien. He alleges that defendants knew of the existence of the deed of trust when they obtained their judgment, but does not charge them with notice of any equities when they purchased two years later. Held, that, admitting the deed of trust was bona-fide, it cannot be reinstated, but the defendants took the title by their sheriff's deed; but the facts show that the deed of trust was fraudulent, contrived for the purpose of enabling the maker to defraud defendants, and that plaintiff knew of the existence of the judgment when he released the deed of trust.

Appeal from Jackson Circuit Court.—*Hon. Frank G. Johnson, Judge.*

REVERSED AND REMANDED (*with directions*).

Wm. R. Thurmond and James M. Chaney for appellants.

(1) Under the pleadings and the evidence the court erred in decreeing a cancellation of the release of the deed of trust and reinstating same as a lien superior to appellants' title under the sheriff's sale in execution.

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Davis v. Owenly, 14 Mo. 170; Valentine v. Havener, 20 Mo. 133; Stillwell v. McDonald, 39 Mo. 282; Potter v. McDowell, 43 Mo. 93; Reed v. Owenby, 44 Mo. 204; Black v. Long, 60 Mo. 181; Vance v. Corrigan, 78 Mo. 94; Stafford v. Fizer, 82 Mo. 393; Land Co. v. Rhodes, 54 Mo. App. 132; Blevins v. Smith, 104 Mo. 601; Wilson v. Jackson, 167 Mo. 135; Machine Works v. Bowers, 200 Mo. 231; Land & Lbr. Co. v. Bippus, 200 Mo. 697; Tate v. Saunders, 245 Mo. 217; White v. Lbr. Co., 240 Mo. 20; Higbee v. Billick, 244 Mo. 427. (2) The court erred in admitting evidence by plaintiff as to his ignorance of the effect of his release of the deed of trust, so as to establish appellants' title under the sheriff's deed as superior to plaintiff's alleged lien. Kingman v. Shawley, 61 Mo. App. 54; McIntyre v. Casey, 182 S. W. 969; Garrett v. Wiltse, 252 Mo. 714. The court erred in admitting vague and uncertain testimony by plaintiff as to his expense in maintaining the property. 13 Cyc. 214; Barngrover v. Maack, 46 Mo. App. 407..

Charles S. Owlsley and Roland Hughes for respondent.

(1) A court of equity will set aside the satisfaction of a mortage or deed of trust where the entry of satisfaction is made by mistake, and where there are no intermediate rights acquired upon the faith of the satisfaction. Christy v. Scott, 31 Mo. App. 337; Bruce v. Nelson, 35 Iowa, 157; Young v. Morgan, 89 Ill. 199; Stinson v. Pease, 53 Iowa, 574; Morgan v. Hamit, 23 Wis. 30; Barnes v. Mott, 64 N. Y. 397; Seiberling v. Tipton, 113 Mo. 379. (2) The satisfaction of the deed of trust on the margin of the record possessed no more sanctity nor conclusive force than a receipt for the money. Christy v. Scott, 31 Mo. App. 337; Land Co. v. Rhodes, 54 Mo. App. 129; Chappel v. Allen, 38 Mo. 223; Valle v. Iron Mt. Co., 27 Mo. 455; Homer v. Grasholz, 33 Md. 525; Seiberling v. Tipton, 113 Mo. 373. (3) Mistake in such connection is nothing more than "that result of ig-

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norance of law or of fact which has misled a person to commit that which if he had not been in error, he would not have done." Story, Equity, sec. 110, note 1; Christy v. Scott, 31 Mo. App. 337; Bruce v. Nelson, 35 Iowa, 157; Stinson v. Pease, 53 Iowa, 574; Hutchinson v. Schwartsweller, 31 N. J. Eq. 205; Young v. Morgan, 89 Ill. 205; Shaver v. Williams, 87 Ill. 472. (4) A purchaser at an execution sale is not an innocent purchaser without notice. He buys only such interest as the judgment debtor has; if that interest is subject to equities, even totally unknown to the buyer, the title is subject to the same equities. Martin v. Nixon, 92 Mo. 26; Mann v. Best, 62 Mo. 496; Davis v. Briscoe, 81 Mo. 27.

RAILEY, C.—On July 30, 1912, plaintiff filed in the circuit court at Kansas City, a bill in equity to set aside a release of a deed of trust entered by him upon the margin of record of said deed of trust, recorded in the Recorder's office of Jackson County, Missouri, covering lot 10 in block 11 of Howard and Scott's Addition to Kansas City, Missouri, and to have said deed of trust established as a lien superior to the title of appellants, Hiram H. and Pearl E. Severance, who acquired title to said lot at an execution sale.

The petition alleges that Emil G. Alber, on September 2, 1909, while the owner of above lot, executed, in conjunction with his wife, a deed of trust thereon, to secure a note of \$1,000, in favor of plaintiff, due five years after date, and representing a former indebtedness; that on April 22, 1910, defendants, Hiram H. and Pearl E. Severance, obtained in the circuit court at Independence, Missouri, a judgment against said Emil G. Alber for \$700, which became a lien upon said lot, subject to the lien of said deed of trust; that on June 6, 1910, Alber made default in the payment of the interest due on said note and failed to pay the taxes on said lot; that plaintiff thereupon exercised his right to declare the whole of the note aforesaid due and payable; that Alber informed plaintiff of his inability to pay said indebtedness, and in

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order to save costs and expenses, offered to deed plaintiff his equity of redemption in said lot; that, pursuant to said offer, he and his wife, executed and delivered to plaintiff, on June 6, 1910, a warranty deed for said lot, which was recorded in said county on June 7, 1910, in Book "B"—1312, at page 376, of the records of the Recorder's office. The petition further alleges: "That the consideration for the said conveyance was the agreement of this plaintiff with the said Emil G. Alber to surrender his obligation upon the said note; and that this plaintiff, by mistake and inadvertence and in ignorance of his rights and the legal effect of so doing and in ignorance of the fact that a judgment had been rendered against the defendants Emil G. Alber and Lydia L. Alber, in favor of Hiram H. Severance and Pearl E. Severance, and in ignorance of the fact that said judgment was a lien upon the said property, entered satisfaction of the said deed of trust on the margin of the record where same was recorded in the office of the recorder of deeds of Jackson County, Missouri, aforesaid;" that the legal effect of above action was to leave the record showing said judgment to be a first lien on said lot, etc; that Hiram H. Severance and Pearl E. Severance, *at the time said judgment was rendered, knew of the existence of plaintiff's deed of trust as a first lien upon said property.* The petition then avers that appellants, after learning of the satisfaction of said deed of trust on April 30, 1912, had an execution issued upon said judgment, and caused said lot to be sold at sheriff's sale thereunder, on *June 3, 1912*; that they became the purchasers of said lot at the sheriff's sale, received a deed from the sheriff therefor, and recorded the same on June 18, 1912, in Book "B"—1426, at page 312, in the Recorder's office aforesaid. The petition prays the court to cancel and set aside the entry of satisfaction on the margin of said deed of trust, and to establish by its decree said deed of trust as a first lien on said lot, and to cancel said sheriff's deed, as a cloud on plaintiff's title, etc.

Defendants Alber and wife filed no pleadings in the cause. The appellants demurred to the petition, but their

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demurrer was overruled, and they filed a joint answer and cross-bill. They admit that on September 2, 1909, Emil G. Alber was the owner of said lot, but deny that he was indebted to plaintiff. They allege that on August 20, 1909, and for a long time prior thereto, said Emil G. Alber and Walter Kennedy were indebted to the above defendants in the sum of \$700; that on August 20, 1909, these defendants filed suit in the circuit court aforesaid at Independence, Missouri, for the recovery of said sum, and on September 2, 1909, said Alber executed to plaintiff—his father-in-law—the note and deed of trust described in the petition. They allege that said note was executed without consideration and for the purpose of fraudulently covering up said real estate, to prevent them from subjecting the same to the payment of their indebtedness; that on April 22, 1910, they obtained a judgment in the circuit court aforesaid, against said Alber and Kennedy for \$700; that in continuation of the scheme of said Alber to defraud them, he and his wife executed and delivered to plaintiff, but without consideration, the warranty deed described in the petition. They admit that they bought the lot in controversy at the execution sale on June 3, 1912, received a sheriff's deed therefor, and that the same was duly recorded as heretofore stated on June 3, 1912; that they paid to said sheriff the amount of their bid, etc. *They deny that they had any knowledge of the fact that said deed of trust was a first lien on said lot*, but aver that it was given without consideration, etc. They deny that plaintiff was ignorant of the rendition of their judgment, and allege that the warranty deed was given to him by Alber and wife to defraud these defendants. The answer then prays for judgment; that the title to said lot be declared to be in them, and that the interest of said plaintiff and the other defendants be cancelled and terminated, etc.

The reply is a general denial of the new matter pleaded in the answer.

In order to avoid repetition, we will consider the evidence, as far as necessary, in the opinion.

The decree below was in favor of plaintiff. The defendants, Hiram H. Severance and Pearl E. Severance,

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filed their joint motions for a new trial and in arrest of judgment, both of which were overruled, and the cause duly appealed to this court.

I. It becomes necessary, at the outset, to determine from the record, whether the deed of trust given by Alber and wife to Leander W. Byrum, as trustee, on the real estate in controversy, to secure a note of \$1,000, given by them of even date therewith to plaintiff, represented a bona-fide indebtedness of said amount from Alber to plaintiff, or whether it was executed to enable Alber to encumber said property for its value and thereby place it beyond the reach of the demand of appellants, as evidenced by their suit against Alber, brought in the circuit court at Independence, Missouri, on August 20, 1909, for \$700.

Mortgage to Defeat Execution.

It appears from the evidence that defendant, Lydia L. Alber, was the only child of plaintiff and that she married Emil G. Alber about 1895. Plaintiff's wife died about 1904. Since 1909, and before that time, plaintiff says he commenced boarding with Mrs. Alber and paid his board regularly every week. He claims to have bought the lot in suit in 1884. He testified that he deeded said lot to Alber about fourteen or fifteen years after his daughter married. He fixed the date as 1887, but it must have been about 1897 or 1907. He says Alber built a house on the lot before he received a deed for same. Plaintiff testified that the \$1,000 note, secured by said deed of trust, was made up of money which he had loaned Alber from time to time, and \$300 which he claims represented the purchase money of said lot. The testimony in chief of plaintiff, on this subject, reads as follows:

"Q. Did you just give it to him, or did he buy it from you? A. Well, that is, I gave him the lot.

"Q. You gave him the lot? A. Yes, sir; I deeded it to him.

"Q. For nothing, or did he pay you anything?

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A. I deeded him the lot in consideration of three hundred dollars.

"Q. The consideration for the deed was three hundred dollars? A. Yes, sir.

"Q. Did he pay you the \$300? A. He never did."

Emil G. Alber testified, that he was married sixteen years before the trial in 1914, which would be about 1898; that he bought the lot and was to pay plaintiff \$300, but never paid for same. Witness testified:

"He (plaintiff) loaned me money from time to time for different things and to live on and at last it came to so much, *that suit was coming up and I wanted some more money*. I needed three hundred dollars, *and I told him the fix I was in.*"

But he said plaintiff refused to let him have more money without a mortgage to secure it and what he had previously received. Witness, *after saying he did not expect to pay plaintiff*, testified:

"Q. Did you say that you never expected to pay it back? A. Well, yes, I expected of course when I got it to pay it back, *but it was all a sort of a family affair*, and I didn't pay it back, for I never got fixed so I could pay it back, because I didn't have the money."

On August 20, 1909, appellants sued Alber in the circuit court at Independence, Missouri, for \$700, and afterwards got judgment against him for said sum. Just *twelve days* after said suit was filed, the deed of trust was executed, and bears date of September 2, 1909.

It appears from the testimony of Mr. L. W. Byram—a witness for plaintiff—that Alber got him to prepare the deed of trust and also the deed which he made to plaintiff. Witness testified that he had never seen plaintiff until the day of trial.

The *dealings*, between relatives of this character, where the rights of creditors are involved, as a rule, should be closely scrutinized. [Barrett v. Foote, 187 S. W. (Mo.) l. c. 70; Ice & Cold Storage Co. v. Kuhlmann, 238 Mo. l. c. 697; Cole v. Cole, 231 Mo. 236; Bank v. Fry, 216 Mo. l. c. 45.] We are satisfied from the evidence that plaintiff *gave* the lot in controversy to

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defendant Alber, without any *intention* of receiving any consideration therefor. Plaintiff's testimony, is vague, indefinite, uncertain, and does not satisfy us that he actually let Alber have any money, with the *intention* of having it *repaid*, before the execution of said deed of trust, but that whatever Alber received, if, anything, was simply a *gift to him as a member of the family*. We are further satisfied from the evidence that *Alber explained his condition to plaintiff*, as above stated and informed him as to the pendency of the Severance suit. *Alber* had the deed of trust prepared himself, after his talk with plaintiff, and likewise had the deed prepared from himself and wife to plaintiff, in which it was provided that the deed of trust was to be satisfied of record.

After carefully reading the record the second time, we are satisfied from same, that plaintiff and defendant, Emil G. Alber, on September 2, 1909, caused the deed of trust aforesaid to be executed and placed of record for the purpose and with the intention of fraudulently placing the lot beyond the reach of appellants, as creditors of said Alber. We are further satisfied from the record, that both *plaintiff and Alber* caused to be prepared and recorded the warranty deed from Alber and wife to plaintiff, *under the belief* that by so doing, they had cut off the right of appellants, as creditors of Alber, from charging said lot with the payment of their debt, or from acquiring the title thereto under an execution sale.

On the record before us, we are of the opinion that plaintiff is not entitled to the relief prayed for in this action.

II. In addition to the conclusion above reached, we are of the opinion that plaintiff is not entitled to maintain this action on account of the intervening rights of appellants. The sequence of events, leading up to the present suit, as shown by the record, may be stated as follows: (1) Suit filed by the Severances against Alber and Kennedy, in the circuit court of Jackson County,

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Missouri, at Independence, August 20, 1909; (2) deed of trust, executed by Alber and wife, securing note for \$1,000 given by Alber to Rehm, September 2, 1909; (3) judgment rendered in favor of Severances against Alber, April 22, 1910; (4) warranty deed from Alber and wife to Rehm, conveying lot now in question, June 6, 1910; (5) deed of trust released on margin of record by Rehm, June 7, 1910; (6) levy upon lot in question, under the Severances' judgment, May 6, 1912; (7) execution sale of said lot, under Severances' judgment against Alber, June 3, 1912; (8) sheriff's deed to the Severances, conveying said lot, purchased by them at execution sale, June 12, 1912; (9) sheriff's deed, last mentioned, recorded, June 18, 1912; (10) suit now at bar filed by Rehm, seeking to set aside his own release of the deed of trust and to re-instate same as a lien upon the property superior to appellants' (Severances') title acquired at sheriff's sale, July 30, 1912.

Plaintiff in chief, testified:

"Q. When was the first time you learned about this judgment? A. Well, later on.

"Q. Well, how long? A. *In a short time.*

"Q. Before or after you got the deed back? A. Before he gave me the deed back I heard something.

"Q. After they had sold it under the judgment and had taken it? A. Yes, sir."

Of course *Alber* knew of the suit, and must have known of the rendition of the judgment. *He was acting for himself and plaintiff*, when he executed both the deed of trust and warranty deed to respondent. Although the plaintiff knew of the judgment and sale thereunder, he made no effort to have his entry of satisfaction of the deed of trust set aside until July 30, 1912, when the present suit was commenced. We are satisfied from the testimony that both plaintiff and Alber knew of the pendency of the Severance suit, and had the warranty deed executed and recorded to cut off the right of an execution purchaser to buy the land and obtain the title

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thereto. There is nothing in the record to indicate that appellants, or either of them, had any notice of any *alleged equities* between plaintiff and Alber. The warranty deed dated June 6, 1910, in express terms provides that the deed of trust was to be satisfied of record. It was released on June 7, 1910, by plaintiff in person.

Plaintiff's petition, among other things, in referring to said warranty deed, alleges:

"That the consideration for the said conveyance was the agreement of this plaintiff with the said Emil G. Alber to surrender his obligation upon the said note."

Here, then, was the warranty deed, dated June 6, 1910, providing for the release of the deed of trust; the deed of trust released on the margin by plaintiff on June 7, 1910; the lot in controversy levied on by the sheriff, under the Severance judgment, on May 6, 1912; the execution sale thereunder on June 3, 1912; the sheriff's deed delivered to appellants for said lot on June 12, 1912, and said sheriff's deed duly recorded in Jackson County, Missouri, on June 18, 1912. *It thus clearly appears, that the deed of trust was satisfied of record, when the lot was levied on and sold under the above judgment. The deed to appellants for said lot was duly recorded before the commencement of this action to set aside the release upon the margin of said deed of trust.* On the record thus made, we are of the opinion that appellants, under the following authorities, have acquired the fee simple title to the lot in controversy: Sections 2810-11, Revised Statutes 1909; Keaton v. Jorndt, 259 Mo. l. c. 194-5; Tate v. Sanders, 245 Mo. l. c. 217; Higbee v. Bank, 244 Mo. l. c. 427; White v. Lumber Co., 240 Mo. l. c. 20-21; Land & Lumber Co. v. Bippus, 200 Mo. l. c. 697; Harrison Machine Works v. Bowers, 200 Mo. l. c. 231-2; Payne v. Lott, 90 Mo. l. c. 681; Vance v. Corrigan, 78 Mo. 94.

In Higbee v. Bank, *supra*, the facts, in some respects, were similar to those at bar. On page 428, we said:

"In an execution sale the purchaser gets title through his sheriff's deed as against a deed by the execution debtor unrecorded at the time. [Vance v. Corrigan, 78 Mo. l. c. 95-6; Harrison Machine Works v.

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Bowers, 200 Mo. l. c. 231-2.] At very best defendant's released deed of trust could not stand on a better foot than an unrecorded deed."

The foregoing authorities, as well as many others which might be cited, clearly sustain the above quotation. It may be said in passing, that the *converse* of this rule is equally true, and that, where a deed of the execution debtor, which had formerly remained unrecorded, is filed for record before a sale takes place under an execution, it would pass the title, as against the subsequent purchaser at the execution sale. [Givens v. Burton, 183 S. W. (Mo.) l. c. 622, and cases cited.]

The plaintiff in this case invokes the aid of a court of equity to set aside and cancel a release which he has voluntarily entered upon the margin of a deed of trust duly recorded. He seeks to cancel a warranty deed which he obtained from his son-in-law for the lot in controversy, and also asks that said deed of trust be reinstated and declared a prior lien on said lot. He simply alleges that appellants knew of the deed of trust *when they obtained their judgment on April 22, 1910*, and does not charge them with notice of any equities *when they purchased*. If it was a bona-fide deed of trust, the record of same imparted constructive notice to appellants, as to its contents, whether they had any actual knowledge of same or not. The judgment rendered in favor of appellants gave them a lien on the lot in controversy, subject to the lien of said deed of trust, if bona-fide. On June 6, 1910, Alber conveyed the lot to plaintiff by warranty deed, and provided therein, that said deed of trust should be released. On the following day—June 7, 1910—said deed of trust was released on the margin of the record by plaintiff. This release of the deed of trust by the latter, destroyed the *constructive* notice which it formerly imparted, to the effect, that it was a prior lien on said lot. The *judgment* was then left in full force and effect as the *first* lien on said lot, and so continued up to the time when appellants bought the property at execution sale, on June 3, 1912. The plaintiff allowed his entry of satisfaction, on the margin of said deed of trust, to remain

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from June 7, 1910, until the commencement of this action on July 30, 1912, without taking any steps to set the same aside. Instead of bringing this suit, suppose the plaintiff, on July 30, 1912, had obtained a deed of trust from Alber and wife, undertaking to *correct* the marginal release, etc., it is clear that under the above authorities, *with appellants' deed on record*, the second deed of trust would be inoperative to restore the former deed of trust or give it vitality.

Plaintiff's petition fails to allege that appellants had any notice of his alleged equities growing out of the entry of satisfaction upon the margin of said deed of trust, *when they bought at the execution sale in June, 1912, nor is there any testimony in the record tending to show such notice.*

On the record before us, the respondent has failed to make out his cause of action. Under the law and facts of the case, the appellants are entitled to a decree, declaring them to be the owners in fee of the real estate in controversy.

III. We have examined the authorities cited by respondent, and do not deem them in conflict with the conclusions heretofore reached, when considered in the light of our Recording Act. We accordingly reverse and remand the cause with directions to the trial court to set aside its decree; to dismiss plaintiff's bill; to enter a decree in favor of appellants herein, declaring them to be the owners in fee as tenants in common of the real estate in controversy; and to take such steps as may be necessary to put them in possession of said real estate, etc.

Brown, C., concurs.

PER CURIAM:—The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court. All of the judges concur; *Bond, P. J.*, in result.

In re ESTATE of SAMUEL CUPPLES; MAUDE CUPPLES SCUDDER, GLADYS CUPPLES SCUDDER and MARTHA CUPPLES OVERALL v. EDWARD KOELN, Collector of the Revenue, Appellant.

Division One, December 3, 1917.

1. **INHERITANCE TAX:** *Children of Adopted Child.* The words "legally adopted children" found in Sec. 309, R. S. 1909, providing that "all property which shall pass by will, or by the intestate laws of this State, other than to or for the use of the father, mother, husband, wife, legally adopted children, or direct lineal descendants of the testator, shall be and is subject to the payment of a collateral inheritance tax," was intended by the Legislature to except from the tax, not only legally adopted children, but the descendants of such children, and the tax cannot be assessed upon bequests to such descendants.
2. **—: —: Words of Limitation.** The words "legally adopted children," used in the Collateral Inheritance Tax Act, are not words of limitation, used for the purpose of excluding them from the classification of natural children, but were meant to place them in the same class as the natural children of testator or intestate, and the children of such "legally adopted children" in the same class with his "direct lineal descendants."
3. **—: Construction of Statute.** A collateral inheritance tax must be imposed in clear and unambiguous words, and exceptions will be liberally construed in connection with the whole body of the law upon the subject of which it treats.
4. **—: —: Kindred Statutes.** The Collateral Inheritance Tax Statute, in a proceeding to assess the tax against children of testator's legally adopted child, will be construed in connection with the statutes relating to the adoption of children and those regulating descents and distributions of estates of decedents, upon which it depends largely for its operation, and is, to that extent, a part.
5. **—: —: —: Children of Adopted Child: Heir: Classified as Natural Children.** The statute relating to the adoption of children (Sec. 1871, R. S. 1909) makes a child legally adopted by deed an heir of the adopting parent, with all the incidents of that relation, including the incident of the transmission of the inheritance upon the death of such child; and the Statute of Descents

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and Distributions (Sec. 332, R. S. 1909) makes no distinction between such an adopted child and a child by birth, but includes the adopted child in the general designation of children, and his or her descendants in the general designation of the descendants of children.

6. ____: ____: Descendant. The word "descendant" used in the statute declaring that a collateral inheritance tax cannot be imposed on the "direct lineal descendant of the testator" includes the lineal descendants of testator's legally adopted child, and cannot be limited to its common law definition, since that has, as has the definition of the word "child," been enlarged by statute to include persons who did not fall within that definition.
7. ____: Collateral Kindred: Title to Act. Neither an adopted daughter nor her children are collateral heirs, but direct heirs. The title of the act being "an Act to tax collateral inheritances, legacies, gifts and conveyances in certain cases," and as under the Constitution the subject of the act must be clearly expressed in its title, the act cannot be held to impose a tax on a legally adopted daughter or her children, who, by the statutes relating to the adoption of children by deed and the statutes relating to descents and distributions, are not collateral heirs, but, for purposes of inheritance, are "direct legal descendants" of the adopting parent.

Appeal from St. Louis City Circuit Court.—*Hon. Thomas L. Anderson, Judge.*

AFFIRMED.

Orville M. Barnett and Ernest A. Green for appellant.

(1) Respondents herein, as the daughters of Mrs. Scudder, are not exempt from Missouri inheritance tax by reason of the fact that they are children of an adopted child of testator. In order for the children of Mrs. Scudder to be exempt from an inheritance tax they must come within one of the following classes: First, legally adopted children of Samuel Cupples; or, second, direct lineal descendants of Samuel Cupples. (2) The mere fact that the Scudder children were daughters of an adopted child does not make them "adopted children" and, *a fortiori*, does not make them the "legally adopted children" referred to in Sec. 309, R. S. 1909. *Clarkson v. Hatton*, 143 Mo. 55; *Hockaday v. Lynn*, 200 Mo. 461; *Beach v. Bryan*,

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155 Mo. App. 50; Sarazen v. Railway Co., 153 Mo. 485. As Samuel Cupples neither complied with the statute of adoption with reference to the Scudder children, nor even attempted to do so, it cannot be seriously contended that they come within the term "legally adopted children." (3) The Scudder children by virtue of Mr. Cupples's adoption of their mother are not "direct lineal descendants" of Mr. Cupples. Mrs. Scudder is not a lineal descendant of Mr. Cupples. 1 Cyc. 934; Hockaday v. Lynn, 200 Mo. 456; Reinders v. Koppelmann, 68 Mo. 496; 2 Bouvier, p. 260; Walker v. Walker, 25 Ga. 429. Lineal descendants of a person have a general right of inheritance both from the lineal ancestor and from his collaterals; on the other hand, an adopted child is uniformly held to be unable to inherit from the collateral kindred of its adopted parents, the ancestors of such parents or the natural children of such parents. Merritt v. Morton, 143 Ky. 133; Van Matre v. Sankey, 148 Ill. 536; Meader v. Archer, 65 N. H. 214; Phillips v. McComea, 59 Ohio St. 1; Sunderland's Estate, 60 Iowa, 732; Helms v. Elliott, 89 Tenn. 446.

John H. Overall for respondents; *Frederick N. Judson*, of counsel.

(1) A child adopted in compliance with the statutes will inherit the property of the adopting parent the same as if born of such adopting parent in wedlock. Secs. 1671, 1673, R. S. 1909; Fosburg v. Rogers, 114 Mo. 122; Moran v. Stewart, 122 Mo. 295; Hockaday v. Lynn, 200 Mo. 456. (2) The children of an adopted child inherit the property of the adopting parent the same as if they are his natural grandchildren. Bernero v. Goodwin, 267 Mo. 427 Healey v. Simpson, 113 Mo. 340; Power v. Hafley, 85 Ky. 671; Atchison v. Atchison, 89 Ky. 488; Gray v. Holmes, 57 Kan. 217; Pace v. Klink, 51 Ga. 220; Humphries v. Davis, 100 Ind. 274. (3) Section 309 exempts from its provisions legally adopted children and direct lineal descendants. (a) The term "legally adopted children" includes the children of such. Estate of Williams, 62 Mo. App. 349 (cited with approval in Johnson v. Autriker, 205 Mo. 247); Humphries v. Davis,

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100 Ind. 274. (b) The term "direct lineal descendants," includes the children of an adopted child; they are in line of descent through command of the statute the same as if that line had been established by nature. We thus distinguish between lineal descendants by birth and statutory lineal descendants. Bernero v. Goodwin, 267 Mo. 427; In re Matter of Cook, 187 N. Y. 261; Webb's Estate, 250 Pa. St. 179; Sec. 332, R. S. 1909; Fosburg v. Rogers, 114 Mo. 122; 25 Cyc. 1442; Levi v. McCarten, 31 U. S. 102; Estate of Winchester, 140 Cal. 469; Warren v. Prescott, 84 Me. 483; Walker v. Walker, 25 Ga. 429; In re Woolworth's Estate, 85 Vt. 322. (4) The collateral inheritance tax, since it imposes a special burden upon particular persons and property and is not in any proper sense a general tax, should be strictly construed in favor of the citizen. Eidman v. Martinez, 184 U. S. 578; Matter of Enston, 113 N. Y. 174; In re Stewart, 131 N. Y. 27; 27 Ency. Law, p. 340; Blakemore & Bancroft on Inheritance Taxes, sec. 241; In re Starbuck's Estate, 116 N. Y. Supp. 1030; Matter of Mergentine, 129 App. Div. (N. Y.) 367; English's Estate v. Crenshaw, 120 Tenn. 531.

BROWN, C.—This is a proceeding begun in the probate court for the city of St. Louis for the assessment of the collateral inheritance tax against the interest of the three respondents in the estate devised and bequeathed to them by Samuel Cupples, deceased. The amount of the interest of each was found to be \$172, 253.96, and the tax demanded against each was \$8,612.70. The probate court held these testamentary interests to be exempt from such taxation. The matter was appealed by the respondents to the circuit court for the city of St. Louis, where the action of the probate court was reversed, and judgment entered accordingly. A motion for a new trial was sustained, and the collector has appealed to this court from that order.

The facts are that in 1871 Samuel Cupples and wife adopted by deed made in accordance with the statute of this State in such cases, Amelia Ross Lowman (who had come to them as a child in 1868), with the consent

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of her parents evidenced by their joining in the deed. The child's name was changed from Lowman to Cupples and she grew up in the Cupples family, was married in 1885 to William H. Scudder, Jr., and became the mother of the three respondents, who lived in the Cupples family. Mr. Cupples characterized Mrs. Scudder in his will as my beloved daughter, and made an affidavit in which he stated that she had "always been our dutiful, obedient and affectionate daughter."

The income of the trust property only was to be paid to the beneficiaries during the first four years of the trust, and then one-fourth of the principal each year until all should be paid. All payments of principal and interest were to be contingent upon the beneficiary being alive at the time of the distribution—otherwise the share to go elsewhere.

The question presented is whether or not the children of an adopted child of the testator are required to pay the collateral inheritance tax imposed by ^{Children of Adopted Child.} Section 309, Revised Statutes 1909, upon their respective legacies. The provisions of

that section applicable are the following: "All property which shall pass by will, or by the intestate laws of this State . . . other than to or for the use of the father, mother, husband, wife, legally adopted children, or direct lineal descendant of the testator . . . shall be and is subject to the payment of a collateral inheritance tax of five dollars for each and every one hundred dollars of the clear market value of such property, and at and after the same rate for every less amount, to be paid to the collector of revenue of the proper county, and for the purpose of this article, the city of St. Louis shall be affected through its corresponding officers as if it were a county." The question depends entirely upon the legislative purpose in using the words "legally adopted children" in the provision quoted. If they were used for the purpose of making plain the intention that legally adopted children were to be classified with natural children of the testator or intestate in respect of their rights under the statutes of descents and distributions, then it is plain, as we shall presently see more

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clearly, that their descendants would come within the description of descendants of their adopted parent. If, on the other hand, these words were used as words of limitation, for the purpose of excluding them from that description, by the mention of their adopted parent, a contrary result would follow. In the consideration of that question we will be aided by certain general principles, too well settled to be open to discussion.

The Collateral Inheritance Tax Statute is not a general revenue law founded upon the provision of the State Constitution requiring that taxation shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, but "is a bonus or duty levied upon the right or privilege of the devisee, heir or distributee, for receiving his share." [State ex rel. v. Henderson, 160 Mo. 190, l. c. 215; State ex rel. v. Switzler, 143 Mo. l. c. 329; In re Remme's Estate, Maguire v. University, 271 Mo. l. c. 363.] Such taxation must be imposed in clear and unambiguous terms, and exceptions will be liberally construed in connection with the whole body of the law upon the subject of which it treats. [Blakemore & Bancroft on Inheritance Taxes, sec. 241; 27 Am. & Eng. Ency. Law, 340; Eidman v. Martinez, 184 U. S. 578; Matter of Enston, 113 N. Y. 174; In re Starbuck's Est., 116 N. Y. S. 1030.] This leads us to an examination of the statutes relating to the adoption of children, as well as to those regulating descents and distributions of the estates of decedents, upon which it depends largely for its operation, and is, to that extent, a part.

The statute authorizing the adoption of children rests upon an element in the human character which manifests itself in the desire for children—for some one to nurture and cherish as one's own flesh and blood, and to make return for such offices by bringing affection and comfort to one's old age. This is well illustrated in the case at bar. The three children by birth of the testator died in childhood, and the adopted child took their place and filled it so well that nearly forty years afterward he wrote of her in his will as his beloved daughter and took occasion in an affidavit, made for that purpose, to

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testify to her filial virtues. It is plain that such benefits are ill requited by a system which would make no provision for her children and would leave them at the mercy of an accident of intestacy.

The first section of the statute under which she was adopted (R. S. 1909, sec. 1671) is as follows: "If any person in this State shall desire to adopt any child or children as his or her heir, it shall be lawful for such person to do the same by deed, which deed shall be executed and acknowledged by the person adopting such child or children and recorded in the county of the residence of the person executing the same, as in the case of conveyance of real estate." It is to be noted that under this section he adopted the "child" as his own "heir." These words have a broad meaning and include, under the Statute of Descents and Distributions then and now in force, the transmission of the faculty of inheritance by her death. That this is true has become the settled doctrine of this court. [Williams v. Rollins, 271 Mo. 150; Bernero v. Goodwin, 267 Mo. 427.] The next section imposes upon the adopting parent the duty and upon the child the right to the nurture, treatment and protection of a daughter by birth. The Statute of Descents and Distributions made no distinction between her and a child by birth, but included her in the general designation of children, and her descendants in the general designation of the descendants of children. [R. S. 1909, sec. 332.]

As this court said in *State ex rel. v. Henderson*, supra, "the right of the Legislature to prescribe the right of descent and inheritance cannot be doubted. It is not a natural right." The word heir, "in its strict and technical import applies to the person or persons appointed by law to succeed to the estate in case of intestacy." [Bouv., Law Dict., Title, Heir, and cases cited.] Upon the execution of the deed of adoption the child became a person appointed by law to receive a child's share of the estate in case of intestacy. For all purposes of inheritance from the adopting parent the adopted child is a statutory descendant of the adopting parent. It is upon this principle that the words "children and their de-

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scendants," as used in the Statute of Descents and Distributions, have been held by us to include adopted children and their descendants. It is the plain intent of the Legislature that the intervention of the child by adoption does not break the course of descent from the ancestor.

That the use of the word "children" in a will may, and whenever the intention of the testator seems to indicate it does include the descendants of a deceased child, has long been the settled doctrine of this court. [Peak v. Peak, 195 S. W. 993, and cases cited.] One of the cases so cited (Guitar v. Gordon, 17 Mo. 408) is interesting on this question.

The particular words used in the exception in the collateral inheritance tax statute, and which we must construe here, are as follows: "Other than to or for the use of the father, mother, husband, wife, legally adopted children, or direct lineal descendant of the testator." A learned and ingenious argument is made by the appellant upon the technical meaning of the word "descendant" in the above clause, the common law definition of which includes only those proceeding in direct line by birth from the ancestor. This becomes unimportant when we consider that the same play was once made upon the definition of the words "child" and "children." The common-law definition of "child" in its connection with the right to inherit, only included those begotten of the bodies of persons in lawful wedlock. The meaning of this word has been so modified by statute as to include those legally adopted by persons married or unmarried. The same legislative power that made this change may include in the designation of the descendants those heirs in the line passing through the newly erected child and heir. In fact the word descendant, when applied to inheritance, includes those and those only who take by the law of descents in the descending line. Like the word "children," it must bow to its own statutory definition.

The title of this act so far as it relates to the matter in issue here is as follows: "An act to tax collateral inheritances, legacies, gifts and conveyances in certain cases." That the subject of the act must be clearly expressed in its title is certain, and it seems equally certain

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that neither the adopted child nor her children come within the description of collateral inheritors. In *Estate of Winchester*, 140 Cal. 469, the Supreme Court of that State said: "The act under which the taxes were imposed by the court below in its title relates to 'collateral inheritances, bequests and devises' only, and under the provisions of the Constitution its effect must be limited to the subjects just described. This would exclude successions or bequests to children and grandchildren, whether adopted or not, for clearly they are not collateral, but in a direct line."

It is unnecessary to further discuss the question from this standpoint. We have only referred to it to direct attention to the controlling effect of the provision of the Statute of Descents and Distributions in the interpretation of the statute under consideration. The law of inheritance is the creature of this statute, and the taxation of inheritances is founded upon it, and the description of the inheritance to which it applies or does not apply must necessarily stand upon that foundation and be interpreted from that standpoint. Of itself it creates no inheritance. When adopted children were made heirs under the designation of *children*, no change in the law of descents became necessary, but these *children* took their place automatically by that name in the descending line and they and their descendants have ever since inherited in that line from the adopting ancestors. [*Fosburgh v. Rogers*, 114 Mo. 122; *Hockaday v. Lynn*, 200 Mo. 456.]

Had the taxing statute omitted all reference to adopted children and exempted only the "direct lineal descendants of the testator," its effect would be plain. The Statute of Adoption places the adopted child next in the line of descent from the ancestor, of whom, for the purpose of inheritance, he becomes the child and heir, with all the incidents of those relations, including the incident of transmission of the inheritance by his death, and the children of the adopted one would stand in the same line of descent as their parent. Thus far the question has been firmly settled by the Williams

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and Bernero cases, *supra*; but it is contended by appellant that the mention of adopted children in the tax law excludes all other inheritors under the adoption law.

To charge these grandchildren with this special tax requires that the legislative intention so to do should be plainly expressed, and in ascertaining the intention of the Legislature the same simple rules of construction are applicable which we applied in the Williams and Bernero cases. The word children may, whenever reason requires it, be construed to include their descendants. We think that rule is peculiarly applicable in this case. All the reasons which may be given for the exception of the adopted daughter seem to us to be applicable to her children, and a fair view of the clause we have quoted on which our decision depends indicates to our mind that "legally adopted children" were mentioned, not with a view to deprive their children of any advantage to which they would be entitled were the words "legally adopted" omitted, but were inserted for the opposite purposes of indicating that legally adopted children were not to be omitted from the category of descendants. [Estate of Winchester, *supra*; Matter of Cook, 187 N. Y. l. c. 261.]

These two cases are squarely in point here. Both were proceedings for the collection of collateral inheritance taxes under statutes similar to our own. The New York statute provided that when the legacy was "for the use of any . . . child . . . or any child or children adopted as such . . . or to any lineal descendant of such decedent born in lawful wedlock" it should be exempt from taxation.

The California statute exempted property going "to or for the use of . . . lawful issue . . . or any child or children adopted as such . . . and lineal descendant of such deceased born in lawful wedlock." The exception was held to apply to children of the adopted child in both cases. Under our own statute we have reached the same conclusion.

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For the reasons stated the order sustaining the motion for a new trial is affirmed.

Railey, C., concurs.

PER CURIAM:—The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All of the judges concur.

THE STATE v. PALLAS WEBER, Appellant.

Division Two, December 4, 1917.

1. **CONTINUANCE: Due Diligence.** The showing of due diligence on the part of the applicant bears an important part in determining his right to a continuance. Where defendant, after he had learned that a notary public in a near-by State, employed by him for the purpose, had refused to take the deposition of an absent witness, still had ten days before the day already set for the trial in which to take the deposition and made no further attempt to take it, the court did not abuse its discretion in refusing a continuance.
2. **AGE OF PROSECUTRIX: Contradictory Evidence by Her: Party to Action.** The prosecutrix testified that at the time of the trial, which occurred April 10, 1917, she was sixteen years of age, and that the act of sexual intercourse occurred February 10, 1916. On cross-examination she testified that she was born on July 9, 1901, and that she was fifteen years old in 1915. Held, that, her testimony being contradictory on the issue of whether she was between the age of fifteen and eighteen years at the time the act was committed, the question of her age was for the jury. The rule, that where one of the parties to the suit testifies to facts against interest he is bound by such admissions unless avoided by contrary satisfactory evidence given by himself, has no application to the conflicting testimony of a witness not a party to the suit, and consequently no application to the said testimony of prosecutrix.
3. **EVIDENCE: Statutory Rape: Inference from Witness's Refusal to Criminate Himself.** No inference of the existence of the incriminating fact is permitted to be drawn from the witness's claim of his constitutional right to refuse to answer, and therefore the witness's claim of the privilege is not a proper matter of evidence

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for the jury's consideration. Where Waddle was absent from the State at the date of defendant's trial for statutory rape of a girl between the ages of fifteen and eighteen years and of previous chaste character, it was not error to exclude the testimony of the justice of the peace to the effect that at the preliminary hearing said Waddle was a witness and on being asked if he had had sexual intercourse with prosecutrix he refused to answer on the ground that his answer would incriminate him.

4. ——: ——: Chaste Character: Prior Acts of Sexual Intercourse. In a prosecution of a defendant for carnal knowledge of a girl between the ages of fifteen and eighteen years and of previous chaste character, testimony of prior acts of sexual intercourse with other men is proper, but subsequent acts with them are not material on the question of her previous chaste character or of defendant's guilt.

Appeal from Christian Circuit Court.—*Hon. Fred Stewart, Judge.*

AFFIRMED.

Barrett & Moore for appellant.

- (1) The court should have sustained the demurrer filed at the close of the State's evidence and at the close of all the evidence. *State v. Daubert*, 42 Mo. 242; *State v. Warner*, 74 Mo. 83; *State v. Bass*, 251 Mo. 107. The evidence conclusively shows that when the injured party first had sexual intercourse with defendant, if at all, she was not of previous chaste character and not between the ages of fifteen and eighteen years. R. S. 1909, sec. 4472; *State v. Arnold*, 267 Mo. 33; *State v. Chenk*, 238 Mo. 429; *State v. Henderson*, 243 Mo. 509. (2) Defendant should have been allowed to prove what the witness Lawrence Waddle testified to in the preliminary examination as such witness testified before the examining magistrate, and was out of the jurisdiction of the circuit court at the time of trial. *State v. Able*, 65 Mo. 367; *State v. Eastham*, 240 Mo. 241; *State v. Butler*, 247 Mo. 693. (3) Under the showing made, the court should have sustained defendant's application for continuance and in overruling same the discre-

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tion granted trial courts was used to the prejudice of this defendant. State v. Hesterly, 182 Mo. 16; State v. Lewis, 74 Mo. 222; State v. Dewitt, 152 Mo. 76; R. S. 1909, secs. 5203, 5204. (3) The court erred in sustaining the objection to the question asked witness, as to whether she had ever had intercourse with any other man except Weber as such question was to ascertain as to her previous chaste character, which is one of the elements of the offense charged that the State must establish beyond a reasonable doubt. State v. Wheeler, 94 Mo. 252; State v. Patterson, 88 Mo. 88.

Frank W. McAllister, Attorney-General, and Shrade P. Howell, Assistant Attorney-General, for the State.

(1) An application for continuance is addressed to the sound discretion of the court, with the exercise of which an appellate court will not interfere unless it clearly appears that such discretion has been abused to the prejudice of appellant. State v. Sassaman, 214 Mo. 735; State v. Cummins, 189 Mo. 640; State v. Cain, 247 Mo. 704; State v. Richardson, 194 Mo. 240. (2) The action of the court in refusing to admit the testimony of Z. Acuff as to certain answers made by the absent witness, Waddle, at the preliminary hearing, was proper under the circumstances in this case. State v. Riddle, 179 Mo. 297; State v. Butler, 247 Mo. 685. Furthermore, acts of unchastity after the commission of the offense charged are inadmissible. State v. Knock, 142 Mo. 515; State v. Day, 188 Mo. 359; State v. Perrigin, 258 Mo. 233. (3) The prosecutrix is competent to testify as to her own age, subject to cross-examination. State v. Marshall, 137 Mo. 466; State v. Evans, 138 Mo. 121; State v. Congat, 121 Mo. 463.

WILLIAMS, J.—Upon an information charging him with the crime of statutory rape upon an unmarried female of previous chaste character between the ages of fifteen and eighteen years, defendant was tried in the circuit court of Christian County, found guilty, and

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his punishment assessed at two years in the penitentiary. Defendant duly appealed.

Evidence upon the part of the State tends to establish the following facts:

The prosecutrix, then living with her parents near Ozark, Missouri, began keeping company with the defendant in November, 1915. The first act of sexual intercourse occurred about February 10, 1916; prior to this act the defendant told the prosecutrix that he was twenty years old.

The trial of this case was held April 10, 1917. Upon the examination in chief of the prosecutrix the following occurred:

"Q. How old are you? A. Sixteen."

Upon cross-examination of the prosecutrix the following occurred:

"Q. What year were you born? A. 1901.

"Q. What day and month? A. July 9th.

"Q. 1901? A. 1901.

"Q. In the year 1915 how old were you? A. Fifteen years old.

"Q. Fifteen years old in the year of 1915? A. Yes, sir."

Prosecutrix gave birth to a child January 2, 1917, and she testified that the defendant was its father.

Some time after the preliminary hearing prosecutrix had a conversation with the defendant, in which the defendant in substance said that prosecutrix could clear him if she wanted to; that she could "get up there and not say anything;" and that if she did not clear him he would go to the penitentiary. Defendant also told prosecutrix that the reason he could not take the prosecutrix as his wife was because he was not able; but he promised to help support the child.

There was evidence tending to show that the reputation of prosecutrix with reference to chastity and virtue prior to February 10, 1916, was good.

The defendant's evidence was substantially as follows:

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Defendant testifying in his own behalf stated that in the conversation mentioned as occurring between him and the prosecutrix the prosecutrix said "that she did not lay the blame altogether on me, and I asked her who, and she said Waddle, and that Waddle was the father of the child." He did not testify as to whether he had or had not had sexual intercourse with the prosecutrix.

The defendant offered as a witness Z. Acuff, justice of the peace, and offered to prove by him that at the preliminary hearing, held before the witness, one Lawrence Waddle (then a witness at the preliminary hearing, but who at the time of this trial was out of the State) was asked whether or not, prior to February 10, 1916, he had had sexual intercourse with the prosecutrix, and that said witness refused to answer on the ground that it would incriminate him. This offer was excluded by the court.

One of defendant's witnesses testified that one evening, in the winter of 1915, the prosecutrix was visiting at the home of a girl in the neighborhood. The witness and Waddle called to see the young ladies—Waddle calling to see the prosecutrix; that about ten o'clock at night the Waddle boy and the prosecutrix went outside the house and remained about thirty minutes. The witness remained in the house, but said he could hear knocking outside of the house, "like a couple of horses out in the barn kicking, but it was at the side of the wall," and that he thought the noise was made by Waddle and the prosecutrix.

I. Appellant contends that the court erred in overruling his application for a continuance. The record discloses that on the day the case was first **Continuance.** set for trial, to-wit, on February 27, 1917, defendant filed an application for a continuance on the ground that a material witness, one Lawrence Waddle, had recently left the State and was then in Oklahoma. The court denied the application for a continuance, but of its own motion continued and

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reset the cause for trial on April 10, 1917. On this latter date defendant again filed a motion for a continuance, alleging as a ground the absence of this same witness. In his second motion defendant alleged that on March 27, 1917, he located witness Waddle at Sand Springs, Oklahoma, and on said date sent proper commission and interrogatories to a notary public in Oklahoma for the purpose of taking the deposition of said witness on April 3, 1917; that on the 29th day of March, 1917, the officer who had been thus commissioned, arbitrarily returned said papers to the defendant's attorney and refused to act in the premises, the returned papers having been received by defendant on the 30th or 31st of March, 1917. The application asked that the cause be continued so that further time might be had in which to take the deposition of the absent witness. The court overruled the motion and the cause proceeded to trial.

The court did not commit error in overruling the application. From the showing made it appears that defendant, after he learned the Oklahoma notary would not act in the matter, had yet remaining, before the trial, ten days in which to make further effort to secure the deposition, but it does not appear that any further attempt was made until the morning the case was called for trial. The showing of due diligence upon the part of the applicant bears a very important part in determining his rights to a continuance. The showing made was very unsatisfactory in this regard, and we are of the opinion that the court was acting within the scope of a sound discretion in refusing the continuance. [State v. Cain, 247 Mo. 700, l. c. 705.]

II. The main contention made by appellant as ground for reversal is that the court erred in overruling his demurrer to the evidence offered at the close of the case. In this behalf it is urged that there is not sufficient evidence to authorize the jury to find that at the time of the occurrence of the alleged carnal act on Feb-

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ruary 10, 1916, the prosecutrix was between fifteen and eighteen years of age as required by the statute upon which the information was based. Appellant contends that the evidence shows that at the time above mentioned the prosecutrix was under fifteen years of age and that therefore defendant could not be found guilty of the crime of which he stood charged.

The only witness giving any testimony on the point was the prosecutrix. Upon her examination in chief she testified that she was sixteen years of age. On cross-examination she testified she was born on July 9, 1901. On further cross-examination she said that she was fifteen years old in 1915. From this it appears that the testimony of the witness is contradictory. If she were born July 9, 1901, she was under fifteen years of age on February 10, 1916; if on the other hand, she was fifteen years old in 1915 then she was between the age of fifteen and eighteen years on the date of the alleged carnal act.

Under such circumstances the question of her age was properly submitted to the jury. [State v. Marshall, 137 Mo. 463, l. c. 468.]

The rule, that where one of the *parties* to the suit testifies to facts against interest, he is bound by such admissions unless avoided by contrary evidence given by himself, satisfactory explanation for the conflict in testimony having been given (which rule was fully discussed and applied in the recent case of Steele v. Railroad, 265 Mo. 97), has, as was specifically stated in that case, no application to the conflicting testimony of a witness not a party to the suit.

In that case it was said: "We need not reiterate that as to a mere witness no state of facts could ordinarily arise upon any matter of contradictory evidence, that would oust the triers of fact of their privilege in a law suit of resolving the truth of such contradiction." [Id., l. c. 118.]

III. It is contended that the court erred in excluding the former testimony of one Lawrence Waddle

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Inference
from Witness's
Refusal to
Incriminate
Himself.

given at the preliminary hearing in this case held before Z. Acuff, a justice of the peace. A showing was made that said Waddle was at the date of the present trial absent from the State. After such showing defendant placed the justice upon the stand and offered to prove by him that at the preliminary hearing in this case said Waddle was sworn as a witness and was asked the following question: "Did you prior to the 10th day of February, 1916, have sexual intercourse with the prosecuting witness? (naming the prosecutrix herein)," and that in response to this question the witness claimed his constitutional right and refused to answer the question.

The above offer was refused and the defendant saved an exception. We are of the opinion that the court's action in this matter was free from error.

It has now become well settled by the great weight of authority that no inference of the existence of the incriminating fact is permitted to be drawn from the witness's claim of privilege and that therefore the witness's claim of privilege is not a proper matter of evidence for the jury's consideration. [3 Wigmore on Evidence, par. 2272, pp. 3146-3147; 1 Greenleaf on Evidence (16 Ed.), par. 469 (d), p. 615; Phelin v. Kenderdine, 20 Pa. St. 354, l. c. 363; Beach v. U. S., 46 Fed. 754; People v. Maunausau, 60 Mich. 15; Waer v. Waer, 90 Atl. (N. J. Ch.) 1039; Loewenherz v. Merchants & Mechanics Bank of Columbus, 144 Ga. 556; Masterson v. Transit Co., 204 Mo. 507, l. c. 524; Garrett v. Transit Co., 219 Mo. 65.] To the writer's mind the best announced reason for the rule is found stated in an early case by the Supreme Court of Pennsylvania as follows:

"When a witness declines answering a question, upon the ground of its tendency to criminate himself, the objection is addressed to the court and the decision upon it is to be made by the court, and not by the jury. If the privilege claimed by the witness be allowed, the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to

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the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right. The allowance of the privilege would be mockery of justice, if either party is to be affected injuriously by it. The exercise of this right by the witness is not under the control of the parties, and no one can be affected by evidence which his adversary fails to produce, and which, therefore, cannot be met or explained by cross-examination, rebutting evidence, or otherwise." [Phelin v. Kenderdine, *supra*, l. c. 363.]

IV. Appellant contends that the court erred in sustaining an objection to a question propounded to the prosecutrix on cross-examination, as to whether or not she had ever had sexual intercourse with any other man; that the question was proper on the issue as to the previous chaste character of the prosecutrix.

Prior Unchaste Acts. The question did not fix the time as being prior to the alleged sexual intercourse between defendant and the prosecutrix, and the trial court gave as a reason for sustaining the objection that it did not so fix the time. No further attempt was made by defendant to re-frame the question in that regard. The showing of *prior* acts of sexual intercourse between prosecutrix and another would be proper on the issue of previous chaste character, but subsequent acts would not be material in that regard. [State v. Perrigin, 258 Mo. 233, l. c. 238.]

V. There was sufficient evidence to sustain the verdict. Other assignments of errors made are either embraced in the ones above discussed or are not of sufficient importance to merit discussion.

The judgment is affirmed. All concur.

THE STATE v. LEE GULLEY, Appellant.**Division Two, December 4, 1917.**

1. **APPEAL:** No Counsel for Appellant: Review of Record. Notwithstanding appellant in a criminal case is not represented by counsel, the appellate court will, following the mandate of the statute, review the record to the extent of ruling any error properly assigned in the motion for a new trial.
2. **INSTRUCTION:** Credibility of Defendant and Wife. It is not error to refuse an instruction on the weight and credibility of the defendant's testimony or on that of his wife, although requested by defendant; on the contrary, the giving of such an instruction would be reversible error. [Following State v. Finkelstein, 269 Mo. 612.]
3. ———: Refusing Defendant's. It is not error to refuse defendant's requested instructions if the court has already fully and properly instructed on the subjects covered by them.
4. **AGE OF PROSECUTRIX:** Testimony of Aunt. A sister of prosecutrix's mother, and therefore within the purview of the law a member of the mother's family, which fact in a proper situation renders even hearsay declarations admissible in proof of age and pedigree, is a competent witness to testify as to the age of prosecutrix at the time of the assault with intent to rape.
5. ———: Family Bible Record: Cumulative Evidence. Where prosecutrix's age has not been disputed and has already been shown by two uncontradicted and competent witnesses, the admission in evidence of a bare Bible record showing the name of prosecutrix and the day, month and year of her birth, made by her aunt, among entries relating to the aunt's own children, was so far cumulative as not to constitute reversible error, whether or not the entry was of itself incompetent—a question not determined.
6. **ACCESSORY: Of Father to Rape of Daughter:** Substantial Evidence. If upon a careful examination of the acts, behavior and language of the father, charged with being an accessory to an assault upon his daughter less than fifteen years of age with intent to rape, it appears to the court that his language may well have been construed to have no other meaning than that the child was to be sent up to the railway boarding car for the purpose and upon a bargain that the cook and his assistant, one or both, might have sexual intercourse with her, and she was sent and the assault made or attempted, the question of the father's

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guilt becomes an issue for the jury to determine, for these facts constitute substantial evidence.

7. ____: ____: No Force. And though it may well be that neither the said cook, nor his assistant who committed the assault, nor the father, their accomplice, had in mind the use or necessity for force in accomplishing the design of the cook or his assistant to have sexual intercourse with the child, that fact does not mitigate the offense of the father in aiding and abetting the assault, since, the child being under the age of consent, neither force nor the lack of it cuts any figure in the case.
8. **APPELLATE PRACTICE:** Substantial Evidence. If the acts of defendant were obviously susceptible of the construction that defendant is guilty of the crime charged they constitute substantial evidence of his guilt, and the question of his guilt then becomes one of fact for the jury to decide, and not one of law for the appellate court to determine.

Appeal from Lafayette Circuit Court.—*Hon. John A. Rich, Judge.*

AFFIRMED.

Patrick T. O'Hern and Wofford & Kimbrell for appellant.

Frank W. McAllister, Attorney-General, Henry B. Hunt, Assistant Attorney-General, and C. P. LeMire for the State.

(1) The court did not err in refusing defendant's instructions 11, 12, 13 and 14. (a) It would have been reversible error to give instruction No. 11. *State v. Finkelstein*, 269 Mo. 612. (b) Instructions 12 and 13, asked by defendant, were substantially set out in instructions 3 and 7 given. (2) The court did not err in admitting the testimony of Katie Gulley and Mrs. Emma Jenkins regarding the age of said Katie Gulley. *State v. Marshall*, 137 Mo. 463. (3) The introduction of Bible record kept by Emma Jenkins would not warrant a reversal where there is other clear and convincing and undisputed evidence. *Beckham v. Nacke*, 56 Mo. 549.

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FARIS, J.—Defendant was tried in the criminal court of Lafayette County upon an indictment in two counts, charging him with being an accessory before the fact to rape and assault with intent to rape. Having been found guilty of the latter crime his punishment was assessed at imprisonment in the State Penitentiary for a term of five years. After the usual procedure he has appealed.

The facts are unique in legal annals, and present a case of such abhorrent brutality as to render them well-nigh incredible. Briefly these facts run thus: Defendant at and prior to November 26, 1915, was living with his wife and six children in the suburbs of the town of Lexington, in the abandoned office of an old coal mine, likewise abandoned. Two, at least of these children of defendant were girls; one Katie (whom we shall hereafter for brevity refer to as prosecutrix) was fourteen years and five months old at the date aforesaid; the other approaching seventeen years. Defendant, as the record shows him, was wholly worthless, drunken, and shiftless, and bore an evil reputation for morality. He drew, presumably for service in the Spanish War, a pension of eight dollars per month, which pension was too small for his support, and yet so large as to destroy his energy and ambition to support himself; hence he seems to have lived in abject poverty. Near the place of residence of defendant upon the railroad tracks there were at the date mentioned certain boarding-cars, housing laborers engaged as track repairers on the Missouri Pacific Railroad. In charge of these boarding-cars were one Duncan, the cook, and his assistant, or flunkey, Clifton Igleheart. The latter having heard on the day preceding a conversation between defendant and one Steinmetz, which he interpreted as a proposition on defendant's part to traffic in the virtue of his daughters, went to defendant and by the gift of a bottle of brandy induced him to go to the boarding-cars. Reaching these cars and entering into a conversation with Duncan and Igleheart, defendant was told to send prosecutrix and her sister up to the cars with a basket and get a ham

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and certain other provisions, which Duncan exhibited to defendant. Subsequent conversation between defendant on the one part, and Duncan and Igleheart on the other, is thus related by Igleheart:

"Duncan told him that he would like for him to send the girls over to stay all night, and he said, 'No I can't send them over tonight, the girls were going to a box social,' and he says, 'Well, come up in the car, in the kitchen, and I will show you the ice box, show you how much meat we got out there; got some ham and bacon and beef,' and went out in the cooking car and Mr. Duncan offered him a bottle of beer and he said, 'no, he wouldn't drink the bottle of beer;' he said he had that brandy, he would drink the brandy. Then I asked him if he would send the girls over this evening; gave him a quarter and he said, 'Yes,' would send them over right away. So Mr. Duncan asked him if it would be all right and he said, 'Yes, it would be all right;' he said, 'You know what we want with them?' He said, 'Yes, I will send them over right away,' and he left and the girls came over to the car and I helped both of them into the kitchen, and the smallest one I told her to come into the commissary car with me."

Shortly thereafter, defendant returned to his home, called the two girls and ordered them to take a basket and go to the boarding-cars for the provisions promised to him by Duncan and Igleheart. At first the girls refused to go, but by threatening to beat them with a poker, defendant compelled them to take the basket and go up to these cars. Upon reaching the cars the prosecutrix was taken by said Igleheart to one of the sleeping apartments where the assault was committed. Since there seems to be no serious dispute as to the sufficiency of the evidence to make out an assault with intent to rape we need not take up space here to set out the details of this assault. The chief contention being, as we read the record, that the evidence of the defendant's criminal connection with this assault is too meager to sustain this conviction, and not that the evidence offered to prove the assault itself is insufficient to show the

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necessary elements to warrant, or which would have warranted, the conviction of Igleheart of assault with intent to rape.

The testimony of Igleheart as to the language and solicitations of the defendant is fully corroborated by said Steinmetz, who was the predecessor of Duncan, as cook, and to whom on the day preceding this assault, defendant, in the presence and hearing of Igleheart, made a similar proposition to that which he afterwards made to Duncan and Igleheart, and upon which the latter acted.

After the assault, and when prosecutrix reached home crying and screaming, Igleheart left hurriedly and went to Kansas City, where he was arrested some forty-eight hours later. Defendant went immediately to the cars, and after cursing and abusing Duncan (Igleheart having as stated immediately fled), went to the telephone and called the officers to arrest Duncan and Igleheart.

Whether any disposition had been made of the charge against Igleheart, the record does not show. But he was a witness in the case without objection, and his fate need not therefore here concern us farther. If further facts shall become necessary we will set them out in our discussion of the case.

Defendant is not represented in this court by counsel. But in compliance with the mandate of the statute in this behalf, following such light in the pursuit of error, as is afforded us by the motion for a new trial, we have carefully examined the record.

I. Defendant requested the court to instruct the jury on (a) the weight and credibility of the defendant's testimony, and on that of defendant's wife, (b) on the presumption of defendant's innocence, **Instructions.** and (c) on the general credibility of the witnesses and the weight to be given to their testimony. The first instruction requested was properly refused, because the giving of it would have been reversible error. [State v. Finkelstein, 269 Mo.

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612.] This instruction, moreover was carelessly drawn, and bad in form, for it tells the jury how to weigh the credibility of defendant's wife, who was not a witness in the case. This of course would not have prevented the requested instruction from operating as a suggestion to the trial court to give a correct instruction, if the situation had made this incumbent.

Upon the defendant's remaining contentions of error, which are bottomed on the refusal of the court to give certain requested instructions, it is only necessary to say that the court had already fully and sufficiently instructed on the burden of proof, and the presumption of defendant's innocence, and had already given *sua sponte*, upon the question of the general weight and credibility of the witnesses, *the identical instruction* requested by defendant, and of the refusal of which he complains. It is useless to cite authorities to prove that under such circumstances no error inheres.

II. Strenuous complaint is made that the court erred in permitting a witness for the State, who was an aunt of the prosecutrix, to testify as to the age **Age of Prosecutrix.** of the latter, and that it was likewise error to offer the entries of the date of prosecutrix's birth, which were made contemporaneously by this witness in a Bible. There is no doubt that in a prosecution of this sort the age of the prosecutrix may become vitally material, and that such age must be shown by the State by competent evidence. In this case, the witness who was offered to prove this fact by her oral testimony was the sister of prosecutrix's mother, and therefore a member of the latter's family, within the purview of the law, which in a proper situation renders even hearsay declarations admissible in proof of age and pedigree. [16 Cyc. 1228.] That the witness's statement as to the age of prosecutrix was competent, we think there can be no doubt. The prosecutrix had herself already testified that her age at the time the alleged assault was made on her was under fifteen years. There was no contradiction, or even attempted contradiction of the fact that prosecutrix was at the time under the age of consent, for upon

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this question defendant offered no countervailing proof whatever.

Upon the point that the entry of the date of prosecutrix's birth, which was made by the aunt in her Bible, among entries relating to the witness's own children, was incompetent, it is enough to say that since there was no dispute about the age of prosecutrix, and since such age had already been shown by two uncontradicted and wholly competent witnesses, the offering of the bare Bible entry, which merely gave the name of prosecutrix, and the day, month and year of her birth, was under the facts so far cumulative as not to constitute reversible error. [Beckham v. Nacke, 56 Mo. l. c. 549.] We are not to be understood as holding that this entry was not admissible. We are merely saying that its admission here was not reversible error, and leaving the point for determination when the question shall become more pertinent. It follows that this contention must be overruled.

III. Complaint is made in defendant's motion for a new trial that there is not in the case any substantial evidence of defendant's guilt. This point is one of some difficulty. The nature of the crime charged, and the natural abhorrence aroused thereby make it appear incredible, but upon a careful examination of the acts, behavior, and language of the defendant, we are constrained to hold that his language might well have been construed to have no meaning other than that the fourteen-year-old prosecutrix was to be sent up to the boarding-cars for the purpose, and upon the bargain with Duncan and Igleheart, that one, or both of them, were to have sexual intercourse with her. It may well be that neither the principals in this crime, nor the defendant, their accomplice, had in mind the use or necessity for force in accomplishing their evident designs. Certain side-lights in the case point to the conclusion that they did not have in contemplation the necessity for the use of force; but since prosecutrix was at the time under the age of consent, force or the lack of it cuts no figure in the case. We are fully convinced that the

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language used by defendant was so far susceptible of the construction which the triers of fact put on it, to-wit, that it was an invitation to, and a bargain with, Duncan and Igleheart to have sexual intercourse with his fourteen-year-old daughter, and an agreement to furnish these men with an opportunity to consummate such bargain, that we will on this point leave the case where the triers of fact left it. We hold that the evidence was substantial, since the language and the acts of defendant were obviously susceptible of the construction which the jury placed on them (*Linderman v. Carmin*, 255 Mo. 62; *Knorpp v. Wagner*, 195 Mo. l. c. 662), and we uniformly hold that when there is in a case substantial proof of the crime charged, or of any required element to make out such crime, the question becomes one of fact for the jury, and not one of law for us. [State v. Taylor, 261 Mo. 210; State v. Concealia, 250 Mo. 411.]

Other matters are urged in the motion for a new trial, but since all such contentions are either not borne out by the record, or being so shown therein have yet not been properly preserved for our review, we are not permitted to consider them.

Let the case be affirmed. All concur.

THE STATE v. WILLIAM C. BOWMAN, Appellant.

Division Two, December 4, 1917.

1. **STATUTORY RAPE: Proof of Force: Not Charged.** The offense denounced by the statute is the unlawful act of sexual intercourse with a female under fifteen years of age, and if force is used in accomplishing the crime, that is a mere immaterial incident, and therefore proof that the act was accomplished by force and against prosecutrix's consent, though force is not charged in the information, is not error.
2. **—: Sufficiency of Evidence: No Proof of Force.** Because the testimony of prosecutrix is incredible in one particular, it does not follow that it is incredible in all particulars. Where prosecutrix, under fifteen years of age at the time of the act of sexual intercourse, testified that it was accomplished by force, and defendant denied that it was accomplished at all, the jury may convict, although the evidence is too weak to establish forcible ravish-

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ment, if her testimony as to the main fact of carnal knowledge is clear and is corroborated by other circumstances.

3. **PHYSICIAN'S ACCOUNT BOOK:** Evidence in Independent Criminal Action: Age of Prosecutrix. The book of a physician, who attended prosecutrix's mother at the time of her birth in another State and made an entry of the charge upon his book, showing the purpose of his visit and the date, and who testifies that he has independent recollection of the occurrence aside from the entry in the book and is certain of the date after having refreshed his memory from the book, is, as a book of account, competent evidence, in a prosecution for statutory rape, of the age of prosecutrix, although the book does not show that the charge was paid. Not only should the physician himself, after refreshing his memory from the book, be permitted to testify, but his book is competent evidence to show the date of prosecutrix's birth.
4. **DEFENDANT AS WITNESS:** Cross-Examination As to Extrinsic Occurrences. In a prosecution for statutory rape, where defendant had testified in his direct examination only as to what occurred on the night the crime is charged to have been committed, it was error for the State to ask him on cross-examination if he had not at previous times been guilty of criminal intimacy with another girl who on that night accompanied him and prosecutrix in the automobile, although he answered in the affirmative and was made to give the time and place, since the cross-examination was entirely outside the scope of the direct examination.
5. **EVIDENCE: Similar Offenses: Intent.** In a prosecution of a defendant for statutory rape, a written extra-judicial admission made by defendant that he had been guilty of criminal intimacy with another girl, is not admissible for the purpose of showing the intent with which defendant committed the act of sexual intercourse with prosecutrix.

Appeal from Jackson Circuit Court.—*Hon. E. E. Porterfield, Judge.*

REVERSED AND REMANDED.

Patrick T. O'Hern, Clarence Wofford and Bert S. Kimbrell for appellant.

(1) The defendant being charged with rape upon Eva Frampton, it was error for the trial court to admit evidence of an act or acts of intercourse by defendant with Clara Parker, or of statements or admissions by defendant with reference thereto. State v.

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Smith, 250 Mo. 274; State v. Teeter, 239 Mo. 475; State v. Vandiver, 149 Mo. 502; State v. Banks, 258 Mo. 479; State v. Phillips, 233 Mo. 299; State v. Hyde, 234 Mo. 200; State v. Horton, 247 Mo. 657. (2) The court erred in permitting the defendant to be cross-examined with reference to matters and things not mentioned or touched upon in his examination in chief. Sec. 5242, R. S. 1909; State v. Burgess, 259 Mo. 383; State v. Swearengin, 190 S. W. 268; State v. Kinney, 190 S. W. 306; State v. Pfeifer, 267 Mo. 23; State v. Goodwin, 195 S. W. 725. (3) The court erred in permitting the day book and ledger of Dr. Janes to be introduced in evidence and read to and examined by the jury. Childress v. Cutter, 16 Mo. 24; Morrissey v. Ferry Co., 47 Mo. 521; State v. Hamilton, 263 Mo. 298. (4) The court erred in permitting the State to introduce evidence showing that the alleged act of intercourse was committed forcibly and against the will of the prosecutrix, there being no allegation in the information that the act was committed forcibly and against the will of prosecutrix. Sec. 22, Art. 2, Constitution. (5) The court erred in refusing to instruct the jury to find the defendant not guilty at the close of all the evidence as requested by defendant, for the reason that the evidence is not sufficient to sustain the verdict. State v. Patrick, 107 Mo. 147; State v. Goodale, 210 Mo. 275; State v. Tevis, 234 Mo. 276; State v. Donnington, 246 Mo. 343; State v. Lawhorn, 250 Mo. 293.

Frank W. McAllister, Attorney-General, and E. M. Conner, Assistant Attorney-General, for the State.

(1) The trial court did not commit error in allowing the State to admit evidence of acts of intercourse of the defendant with Clara Parker and statements or admissions by the defendant with reference thereto. This was allowable to show the intent or motive of defendant. State v. Thornhill, 174 Mo. 370; State v. McLaughlin, 149 Mo. 19; State v. Bailey, 190 Mo. 279; State v. Sarony, 95 Mo. 349; State v. Turley,

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142 Mo. 403; State v. Phillips, 160 Mo. 503; State v. Franke, 159 Mo. 535; State v. Pennington, 124 Mo. 383; State v. Minton, 116 Mo. 605; State v. Williamson, 106 Mo. 162; State v. Toohey, 203 Mo. 678; State v. Spaugh, 200 Mo. 594; State v. Bailey, 190 Mo. 279; State v. Bolch, 136 Mo. 103; State v. Cooper, 85 Mo. 256; State v. Bayne, 88 Mo. 604; State v. Myers, 82 Mo. 558; State v. Hodges, 144 Mo. 50; People v. Molineux, 168 N. Y. 293, 62 L. R. A. 329-335; Goresen v. Commonwealth, 99 Pa. St. 398; Commonwealth v. Robinson, 146 Mass. 577; Commonwealth v. Snell, 189 Mass. 22; Hawes v. State, 88 Ala. 37; Higgins v. State, 157 Ind. 57; People v. Harris, 136 N. Y. 423; Zoldoski v. State, 82 Wis. 580; Wheeler v. State, 23 Tex. App. 598; Shafner v. Commonwealth, 72 Pa. St. 60; Wharton's American Criminal Laws (6 Ed.), sec. 649; 3 Greenleaf on Evidence, sec. 15; Stevens, Digest of Evidence, arts. 11, 12; People v. Zucker, 154 N. Y. 770; Regina v. Cotton, 12 Cox's C. C. 400; Regina v. Geering, 18 L. J. Maj. Cas. 215; Regina v. Heesom, 14 Cox's C. C. 40; Gossenheimer v. State, 52 Ala. 313; Hobbs v. State, 75 Ala. 1. Admissions and statements of the accused are always admissible against him when freely and voluntarily made. State v. Barrington, 198 Mo. 109; State v. Spaugh, 200 Mo. 596; State v. Daly, 210 Mo. 664; State v. Green, 229 Mo. 650. (2) The court did not err in permitting the defendant to be cross-examined with reference to acts of intercourse by the defendant with Clara Parker and with reference to admissions or statements made by the defendant concerning such acts of intercourse. Authorities under point one; also: State v. Barrington, 198 Mo. 85; State v. Mills, 156 Mo. 85; State v. Feeley, 194 Mo. 315; State v. Eishenhour, 132 Mo. 148; State v. Harvey, 131 Mo. 345; State v. Keener, 225 Mo. 499. (3) The court did not err in permitting the day book and ledger to be introduced in evidence and read and examined by the jury. 33 Cyc. 1473; Neill v. State, 49 Tex. Crim. App. 219; People v. Vann, 129 Cal. 118; 10 R. C. L. secs. 63, 341, 343, 350, 372; Note to 69 L. R. A. 475. (4) The court committed

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no error in allowing the State to show that the alleged act of intercourse was committed by force and against the will of the prosecutrix. *State v. Ernest*, 150 Mo. 347; *State v. Allen*, 174 Mo. 689.

WHITE, C.—Defendant appeals from a conviction of statutory rape. The offense was alleged to have been committed upon one Eva Frampton, a girl under the age of fifteen years, during a "joy ride" in defendant's automobile.

The defendant challenges the evidence as being insufficient to warrant a verdict of guilty.

Two other persons, Robert L. Moore, a man 33 years of age, and Clara Parker, a girl apparently older than the prosecutrix, were also in the automobile during the ride. Neither Clara Parker nor Moore testified in the case, although it appears from the record that Clara was in the court room at the time, and Moore was under arrest for the same offense against Eva Frampton as that with which defendant was charged. The girl and the defendant were the only witnesses who presented direct testimony as to what occurred.

Some important facts are undisputed. Eva Frampton's mother, who had separated from her husband when Eva was an infant, had recently moved from Wellsville, Kansas, to Kansas City. Eva had been an inmate of the House of the Good Shepherd and, only a short time before the joy ride, had come to live with her mother at the latter's home in Kansas City. While at the House of the Good Shepherd she had made the acquaintance of Clara Parker. After coming to her mother in Kansas City, some time in May, 1915, while on an errand for her mother, Eva met Clara on the street and was invited by the latter to take an automobile ride that afternoon. Later the two met by appointment at Fourteenth Street and Broadway, and after waiting a few minutes the defendant, Bowman, and Moore came along in Bowman's "Hudson Six." The two girls got in the rear seat, the two men sitting in front, and the joy ride began at about 3:30 in the afternoon.

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The defendant was a married man forty-six years of age, had several children and ran a prosperous restaurant. He had several hundred dollars on his person at the time and paid the expense of the escapade. Eva had never seen either of the two men before, and Bowman, who had made the appointment for the ride with Clara Parker, did not know that Eva was to accompany them.

They drove a few blocks when the four got out and entered a side room or hall adjacent a saloon, where they took several rounds of whiskey. They then proceeded to another place, the precise nature of which does not appear, where they again went in and took drinks. They stopped at several saloons where drinks of whiskey, beer and cocktail were brought out to them by Moore. Besides, they took along bottles of whiskey and prepared cocktails of which they partook as they rode. They finally turned the automobile toward Independence, all of them being more or less drunk. The two men had been drinking before they met the girls. After the visit to the first saloon Clara Parker got in the front seat with defendant, and Moore sat behind with the Frampton girl. The party arrived at Independence before dark and stopped at the home of Mrs. Yetter, Moore's mother, where they all went in and remained for a few minutes. When they continued their ride Mrs. Yetter and her husband accompanied them in the car. They had not been driving long until the car got stuck in the mud. Mrs. Yetter and her husband then left the automobile, intercepted a passing buggy and left for home in it. The four joy-riders remained in the car and, after repeated efforts to extricate it from the mud, it was finally dislodged and started on the return journey to Kansas City, where it arrived at three o'clock in the morning. It had been in the mud several hours. After the car had been in the mud for some time Clara Parker left it, probably going to a street car. Eva was left alone with the two men. During the ride and particularly after the car was stalled, "improper familiarities," as defendant's counsel expresses it, were indulged in by the joy-riders, but defendant claims the crime charged was not committed by him.

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When the car was driven back to Kansas City, Moore got out at an ice plant where he was employed, and defendant drove on with Eva Frampton, left her at a hotel and gave her two dollars to pay for her lodging. She remained there the remainder of that night, the next day, and the following night, and then was taken home by a man staying in the hotel. When she reached home the family and the police were excited about her disappearance, and the defendant was already under arrest.

In the facts as above stated, as well as in many unimportant details of the ride, the defendant and the prosecutrix are in substantial agreement.

There was a sharp conflict in the evidence as to the girl's age. Eva asserted that she was forcibly ravished by both men, by Moore while on the way to Independence, and again after the car became stalled, and by Bowman after Clara Parker left the automobile. The defendant stoutly denied that he committed the act or even attempted any familiarities with the prosecutrix. He said he attempted the act with Clara Parker, but was too drunk to accomplish his purpose. Certain it was, according to the testimony of Eva, as well as of himself, that he was drunk, sick and vomiting a good deal of the time. Defendant also said the reason he took Eva to the hotel was because she was afraid to go home and refused to go.

I. The appellant complains of error by the trial court in permitting the State to prove that the act of carnal intercourse with the prosecutrix was committed forcibly and against her consent, because the information ~~Force~~ failed to allege force, and for that reason the defendant was not advised by the allegation of the charge he was required to meet. The rulings are against that position. The unlawful act committed upon a female under fifteen years of age constitutes the offense. The additional element of force in accomplishing the crime is an immaterial incident. It does not change the nature of the offense as defined by the statute, and a failure to allege it cannot mislead a defendant as to what he must defend against. [State v. Knock, 142 Mo. 515, l. c. 522, 525; State v. Hamey, 168 Mo. 167, l. c. 197-9.]

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Sufficient Evidence Though No Force Is Shown. II. Appellant makes the further point in this connection that a verdict of acquittal should have been directed under the evidence. The argument is that the prosecutrix asserted the act of intercourse was accomplished by force; while the defendant denied the act altogether; therefore, a forcible act was the only one sworn to and if there was no force there was no unlawful act. It is further urged that the evidence must be weighed and considered in the light of rulings of this court in cases of forcible rape. Appellant then points out many circumstances shown by the evidence which indicates force could not have been used, and concludes that there being manifestly an absence of force the crime was not committed. The point is ingeniously and finely drawn. Because the testimony of the prosecuting witness is incredible in one particular, it does not follow that she testified falsely in all particulars. The jury well might have believed the unlawful act was committed without believing her statement that force was used. Her testimony as to the facts was very clear and circumstantial, and was corroborated by other circumstances. It was, we think, sufficient to take the issue to the jury. The court has sustained verdicts of guilt in cases of this character where the prosecutrix asserted force was used where the defendant denied the guilty act, and the evidence of force was as weak as it is here. [State v. Taylor, 267 Mo. 41, l. c. 48; State v. Allen, 174 Mo. 689.]

III. There was a conflict of evidence as to the age of the girl, Eva Frampton, at the time of the alleged offense.

Physician's Account Book. The defense offered evidence tending to show that she was a few months over the age of fifteen years. On the part of the State one Dr. Janes was introduced and testified that he attended her mother at the time of her birth and made an entry upon his charge book of the date, November 9, 1900, showing the purpose of his visit at that date. This book was offered and admitted in evidence. Dr. Janes also testified that he had an independent recollection of the occurrence, aside from the entry upon the book, and

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was certain of the date after having refreshed his memory from the book. The introduction of this book is assigned as error. It was objected to on the ground that no statute of Kansas, where the occurrence took place, was offered making such an entry admissible. It was not offered, however, as evidence made competent by statute, but as a book of account, competent at common law.

It was the English rule, and it has been said in some jurisdictions of this country to be the general rule, that account books kept by third persons and not intended to be accounts of transactions between the parties litigant, are *res inter alios acta* and not admissible in evidence. However, that rule has not been adhered to in many of the States, including this State. Many cases can be cited where books of third persons, not parties to nor interested in the litigation, are admissible in evidence. Such, for instance, as the books of a bank to show the state of a litigant's account at a certain time. [Jordan v. Osgood, 109 Mass. 457; Culver, Admr., v. Marks, 122 Ind. 554, l. c. 563; Anderson v. Edwards, 123 Mass. 273.] Unofficial entries made by a surveyor are admissible in evidence, independent of any statute. [Le Bourgeoise v. Blank, 8 Mo. App. l. c. 441; Williamson v. Fischer, 50 Mo. 198.] The record of a telegraph company showing a telegram sent, has been held admissible in an action between third persons. [St. L. S. W. Ry. Co. v. Sewing Machine Co., 78 Ark. 1; 8 Am. & Eng. Ann. C. 208; Manchester Assurance Co. v. Oregon R. R. & Navigation Co., 69 L. R. A. 475, l. c. 478.] Other entries of third persons and books kept by such third persons, when relevant to the issues between parties litigant, have been held admissible in various civil as well as in criminal cases. [State v. Brady, 36 L. R. A. (Iowa) 693, l. c. 696; Williams v. Geaves, 34 Eng. C. L. 541; C. & N. W. Ry. Co. v. Ingersoll, 65 Ill. 399.]

The entry made by a physician upon his book showing the date of his attendance upon a patient and the complaint of which the patient was suffering, has been held admissible between third parties, in criminal and in civil cases. [Arms v. Middleton, 23 Barb. 571, l. c. 574; Morrow v. State, 120 S. W. (Tex.) 491.] The question came before this court in case of Knapp v. Trust Co., 199 Mo.

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640, l. c. 669-70. That was an action to contest a will, and the book of a physician, who was dead at the time, showing attendance upon the testatrix, the complaint from which she was suffering and his charge for the visit, together with his notation showing payment of the charge, were held admissible in evidence upon the question of mental capacity. This court held the evidence properly admitted on the ground that it was an entry by the physician against his interest, inasmuch as it showed payment of an account; and, inasmuch as the part showing payment was admitted, the entire entry was held admissible. The inference might be from that case that the entry would not be admissible unless the part showing the payment had been entered. In the case of State v. Palmberg, 199 Mo. 233, l. c. 253, where the defendant was charged with the same offense as is charged here, the age of the girl was at issue and the physician who attended her mother at her birth testified to the fact and the date by refreshing his memory from a minute made in a memorandum book at the time. His testimony was held admissible.

In the present action Dr. Janes not only identified his book and the entries made at the time of the occurrence, but stated that he had an independent recollection of the matter and knew the prosecuting witness. No entry was made showing payment of his bill, such as was shown in the Knapp case. We can see no reason why an entry of payment should make any difference as to the admissibility of the other entry showing the date of the visit and its purpose, the physician who made it having no interest whatever in the matter under investigation. Under the authorities cited we think that not only the physician himself was properly permitted to testify, after refreshing his memory from the book, but that his book was competent evidence for the purpose for which it was offered—to show the date of the birth of Eva Frampton.

IV. The defendant was sworn as a witness in his own behalf and in cross-examination the State's attorney asked him if he had not at previous times been guilty of

**Cross-Examination
of Defendant.** criminal intimacy with Clara Parker. He answered in the affirmative, and was

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made to give the time and place of such occurrences. This was objected to on the part of defendant's counsel and exceptions saved to the ruling of the court in admitting it in evidence.

In direct examination the defendant testified only to what occurred during the progress of the automobile ride on the night on which the crime is said to have been committed, so that this cross-examination was entirely outside the scope of the examination in chief, and reversible error under numerous authorities construing section 5242, Revised Statutes 1909. [State v. Swearengin, 269 Mo. 177, l. c. 185; State v. Burgess, 259 Mo. 383, l. c. 397; State v. Pfeifer, 267 Mo. 23, l. c. 30; State v. Goodwin, 271 Mo. 73, l. c. 81; State v. Smith, 250 Mo. 274.]

V. The State offered in evidence a written statement made by the defendant at the time he was arrested, to show that on previous occasions he had been guilty of criminal intimacy with Clara Parker. This was objected

to by defendant and exceptions saved to the admission of the evidence. This, likewise, was reversible error. In discussing this point both the

Similar Offenses: State's counsel and counsel for defendant treated it as an evidence of an independent crime similar to the one charged in the information. It is a rule that such evidence is inadmissible, subject, however, to certain exceptions. Counsel for the State enumerate these exceptions without pointing out specifically the exception under which this evidence would come. The evidence shows no association or connection with the crime charged, and we presume it is offered on the theory that it showed the intent with which the act was committed—the reason usually offered for the introduction of such testimony. The proof of crimes committed by a defendant, similar to that for which he is on trial, for the purpose of showing the intent, is admitted in certain classes of cases, but such evidence is held inadmissible in cases of the character of this one. [State v. Smith, 250 Mo. 274; State v. Teeter, 239 Mo. 475, l. c. 485.]

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For the errors noted, the judgment is reversed and the case remanded.

Roy, C., concurs.

PER CURIAM:—The foregoing opinion of WHITE, C., is adopted as the opinion of the court. All the judges concur.

THE STATE v. MITCHELL HEDRICK, Appellant.

Division Two, December 4, 1917.

1. **HOG: Carcass.** A defendant charged with stealing hogs cannot be convicted of stealing the carcass of a hog. The carcass of a hog, by whatever name called, is not a hog. The word "hog" means a live animal.
2. ____: ____: **Venue: Failure of Proof.** Defendant was charged with stealing four black hogs in Reynolds County and was indicted in that county. The evidence shows that the hogs were stolen and killed in Dent County, and thereafter their carcasses were taken by defendant and two other persons into Reynolds County, where they were cleaned and divided among them. *Held*, that there was a total failure of proof. Defendant could not under the indictment be convicted of stealing the carcasses of hogs in Reynolds County, because he was not so charged.
3. ____: ____: **Statute.** The statute (Sec. 4535, R. S. 1909) making it grand larceny to steal any "horse, mare, gelding, colt, filly, ass, mule, hog or neat cattle" shows on its face that it is not capable of being construed to embrace those animals when dead.

Appeal from Reynolds Circuit Court.—*Hon. E. M. Dearing*, Judge.

REVERSED AND REMANDED:

C. R. Wadlow and Burford & Chitwood for appellant.

The carcasses of the animals charged to have been stolen, were not "hogs" within the meaning of Sec. 4535, R. S. 1909, as evidenced by that and various other

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acts of the Legislature. Larceny of the carcass of a hog under the value of thirty dollars, is not a felony. Secs. 4535, 4864, 4627, 4548, 771, R. S. 1909; Laws 1917, p. 133. As used in the law the term "animals" includes any animate being, which is not human, endowed with the power of voluntary motion. Upon a general statement that a party stole an animal, it is to be intended that he stole it alive, except where it has the same name, whether dead or alive. Wharton's Criminal Evidence (9 Ed), sec. 124; 2 Cyc. 304. The charge is that appellant stole four black hogs. The proof, aside from the uncorroborated testimony of an accomplice was that the carcass of some hogs were hauled by appellant from the point where they were slaughtered in Dent County, to the point where the carcasses were dressed in Reynolds County. There is a failure of proof of the offense charged. State v. Ballard, 104 Mo. 634.

Frank W. McAllister, Attorney-General, Henry B. Hunt, Assistant Attorney-General, and C. P. Le Mire for the State.

(1) The provisions of Sec. 4541, R. S. 1909, do not apply in this case. Here there was a killing of the animals in question, together with the felonious taking or converting of the same, which, taken together, constitute the crime of grand larceny. (2) Defendant's refused instruction read: "You are instructed that the word 'hog' in law means a live animal and not the mere carcass of an animal." It is agreed by all that after a hog has been killed and converted into meat it becomes personal property and is outside of the statute on which this indictment is based. But, as to whether the mere killing of a hog without further transition or transformation from its natural state removes same from the purview of the statute, is a matter which has never been before this court. However, it was unnecessary for the trial court to define the word "hog," as used in the statute. Under the law and the evidence,

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the appellant was aiding and abetting in the felonious taking of hogs which were alive, and, without doubt, within the scope of the statute.

ROY, C.—Defendant was charged in Reynolds County jointly with Ritchey and Strickland with the theft of four black hogs, the property of Bill Grant. He was convicted and sentenced to the penitentiary for three years, and has appealed.

The State's evidence very clearly shows that the hogs were stolen and killed in Dent County near the line between the two counties, and that, after they were killed, the defendant went in his wagon with the other two persons charged and hauled the hogs into Reynolds County, where they were cleaned and divided among them. There is a question on the evidence as to whether this appellant was a party to the transaction prior to the death of the hogs. At the close of the State's evidence the defendant demurred thereto, and the demurrer was overruled.

The defendant asked this instruction, which was refused:

“You are instructed that the word ‘hog’ in law means a live animal and not the mere carcass of an animal.”

He also asked an instruction as to petit larceny in case the jury should find that he had stolen the carcasses of hogs in value less than thirty dollars. It was refused.

I. There was a total failure of proof. Defendant was charged with stealing hogs in Reynolds County. The proof was that they were dead before they were taken into that county. It may be that defendant could be convicted of stealing the hogs in Dent County. It may be possible to convict him of stealing the carcasses of hogs in either Dent or Reynolds County. He cannot be convicted of stealing hogs in Reynolds County, because the hogs, as hogs, were never in that county. He cannot, in this case, be convicted of stealing the carcasses of hogs, because he

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is not charged with such an offense. The carcass of a hog, by whatever name called, is not a hog. The dictionary says that a hog is an animal, and that an animal is a living being. A person charged with stealing wheat in value more than thirty dollars may be convicted of grand or petit larceny, in accordance with the proof as to value. But a person charged as in this case cannot be convicted of stealing mere carcasses of any value, great or small. The English cases on this subject are as follows:

In *Rex v. Edwards*, Russ. & Ry. 497, decided in 1823, the defendants were charged with stealing live turkeys. They were stolen alive and then killed in one county, and then carried into another county. It is there said:

"In Hilary term, 1823, the case was considered by the judges, who held that the word 'live' in the description, could not be rejected as surplusage; and that, as the prisoners had not the turkeys in a live state in Hertfordshire, the charge as laid was not proved; and that the conviction was wrong. And HOLROYD, J., observed, that an indictment for stealing a dead animal should state that it was dead; for upon a general statement that a party stole the animal it is to be intended that he stole it alive."

In the same year there were two cases against one Halloway, decided at *nisi prius* and reported in 1 Car. & P. at pages 127 and 128. In the first he was charged with stealing a "brass furnace" in the county of Hereford. The proof showed that he stole the furnace in the county of Radnor and broke it into pieces which he carried into the county of Hereford. The report of that case states:

"HULLOCK, B., directed an acquittal, and said: Though a prisoner may be indicted for a larceny in any county, into which he takes stolen property, the present indictment must fail, as he never had the 'brass furnace' in Herefordshire, or within five hundred yards of its boundaries; he merely had there certain pieces of brass."

In the other case Halloway was charged with stealing two turkeys. The proof showed that they were dead and were stolen from a larder. It was held that the indict-

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ment meant live turkeys, and that the charge should have been that he stole dead turkeys.

In *Rex v. Puckering*, 1 Mood. C. C. 242, decided in 1829, the defendant was charged with feloniously receiving a stolen lamb knowing that it had been stolen. The lamb had been killed before he received it. It was there said:

"It appeared to the learned judge that whatever may be the case as to many animals, perhaps there might be a different rule as to animals the stealing of which is a capital offence, and it might be a question whether at all events, as to them, when an animal is mentioned it does not mean a live animal. He therefore respite the judgment, in order that the opinion of the learned judges might be taken. This case was considered at a meeting of the judges in Michaelmas term, 1829, and they all agreed that the conviction was good, it being immaterial as to the prisoner's offence whether the lamb was alive or dead, his offence and punishment for it being in both cases the same."

Commonwealth v. Beaman, 8 Gray, 497, a Massachusetts case decided in 1857, discussed the English cases, and held that where the stealing of an animal is charged it means a live animal. *State v. Donovan*, 1 Houst. Cr. Cases (Del.), 43, was decided in 1858. The report of that case contains the following:

"The court stopped the Attorney-General, and GILPIN, C. J., remarked that there were three decisions on the point in the English reports, the last of which had ruled that where the animal is called by the same name, either dead or alive, it is competent under such an indictment as this to prove the stealing of them in a dead state; and shad, he believed, had but that one name whether dead or alive."

It should be noted that none of the above cases involved a statute such as we have here. Indeed the Puckering case above mentioned, which is the leading one on that side, expressly bases its ruling on the ground that the offense and its punishment were the same whether the animal stolen were alive or dead.

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If we concede that the Puckering case is right, the question arises, is the punishment in this State for stealing dead hogs the same as that for stealing live ones? In other words, does our statute make it grand larceny to steal either live or dead hogs regardless of value? That statute, Revised Statutes 1909, Section 4535, makes it grand larceny to steal any "horse, mare, gelding, colt, filly, ass, mule, hog, or neat cattle." On its face it is not capable of being construed to cover those animals when dead. Bishop on Statutory Crimes (3 Ed.), sec. 426, note 13, says that such statutes apply to live animals. All the decided cases we can find in any of our sister states hold the same thing. [Golden v. State, 63 Miss. 466; People v. Smith, 112 Cal. 333; Hunt v. State, 55 Ala. 138; Thompson v. State, 30 Tex. 356; Ballow v. State (two cases), 42 Tex. Cr. R. 261 and 263.] In the first of the last two cases it was held that where hogs were stolen and killed in one county and then carried into another county, there could be no conviction for stealing hogs in the latter county.

In this case the instruction in the nature of a demurrer to the State's evidence should have been given.

The judgment is reversed and the cause is remanded.
White, C., concurs.

PER CURIAM:—The foregoing opinion of Roy, C., is adopted as the opinion of the court. All of the judges concur.

THE STATE v. BENJAMIN W. SMALL, Appellant.

Division Two, December 4, 1917.

1. **VARIANCE:** Question Not Raised in Trial Court. The statute (Sec. 5114, R. S. 1909) requires that the trial court be allowed an opportunity to rule on the question of a variance between the proof and the allegations in the indictment, and if the question is not raised in the trial court it cannot be ruled in the appellate court. In this case the indictment charged that the defendant by false pretense obtained "the sum of five hundred dollars lawful money" and the evidence showed that a check for that sum was the medium of payment.

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2. **FALSE PRETENSE: Indictment.** No set form of an indictment charging the crime of obtaining money by false pretense can be prescribed. The aspects of such crimes are so variable that only a general or skeleton form can be formulated.
3. **_____: _____: Agent of Defendant.** An indictment which fails to charge that the attorney who transmitted the statement of two women upon which a claim for damages was paid by a railway company, was at the time the agent of defendant in that behalf, is defective. It was further necessary to charge that the attorney in transmitting the statement of the women acted in that behalf at the procurement or upon the instigation of defendant. It was not sufficient to charge that defendant and his accomplices, the two women, consulted and employed the attorney and placed the statement in his hands and that he communicated it to the company.
4. **_____: _____: Purported Statement.** An indictment which charges that an attorney exhibited to the agent of a street railway company a statement, "purported to be the statement" of two women, who falsely claimed to have been injured on said company's street car, and said agent, relying on the false and fraudulent statements communicated to him by the attorney of said women, to be true and being deceived thereby, etc., is defective. It should have charged that the exhibit was an actual statement of the women, and not a "purported" statement.
5. **_____: _____: Ownership: Receivers.** The ownership of street railway property is not by an ordinary court receivership transferred to the receivers, but remains in the company; and an indictment for obtaining money by false pretense is not invalid because it charges that the money fraudulently obtained was the property of the company.
6. **_____: Instruction: Following Indictment.** An instruction which fairly follows a proper and sufficient indictment and the evidence adduced is not erroneous.

Appeal from Jackson Circuit Court.—*Hon. Ralph A. Latshaw, Judge.*

REVERSED AND REMANDED.

Roland Hughes for appellant.

(1) The indictment nowhere charges that the defendant Small showed Lucas any statement or made to him any representation. It charges that Oldham,

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acting as attorney for Denham and Dobbins (not as the agent or attorney for Small), showed Lucas a statement signed by Denham and Dobbins, by which he was induced to pay, etc. It is not charged that Oldham was induced, urged, requested or was expected by defendant Small to show the statement to Lucas. The indictment does not connect in any way the defendant with the act of Oldham in showing this statement to Lucas —the thing which it is charged induced Lucas to pay the money to May Dobbins. *People v. Green*, 133 Pac. 334. (2) The indictment is bad. (a) It does not allege that the statement exhibited to Lucas purported to contain a true and correct statement of the facts. (b) It does not allege that the statement exhibited to Lucas was false and fraudulent. (c) It does not allege that said statements were made designedly. (d) It does not allege that the statements were exhibited to Lucas by the defendant Small or through Oldham at the direction of defendant Small. (e) It does not allege that Lucas relied upon, was deceived by or was induced to part with the money by reason of any statement or representation of the defendant Small; but, on the other hand, alleges that the representations and statements which moved Lucas to part with the money were made by Oldham. The principal instruction given by the court in this case is also erroneous for the reason that it attempts to, and does, follow the indictment and warrants the jury in finding the defendant guilty, provided they should find and believe that Lucas relied upon the statements made to him by Oldham, without requiring them to find that the statements which Oldham did in fact make to Lucas were made at the instigation of the defendant and as a part of the alleged false and fraudulent scheme to obtain money by false pretenses. (3) The proof does not sustain the allegations of the indictment. (a) The indictment charges that the defendant obtained the money of the Metropolitan Street Railway Company. The proof is that Harvey and Dunham, receivers of the Street Car Company, issued their check to Oldham & Henderson. (b) The

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indictment charges that Lucas was attorney for the Metropolitan Street Railway Company. The proof is that in this transaction he was the attorney for the receivers, under the direction of the United States Court. (c) The indictment charges that the claim which Oldham presented was against the Metropolitan Street Railway Company. The proof is that he presented a claim against the receivers for damages done by them in operating the railroad, while in their control. Jamison v. State, 37 Ark. 445. "A charge of embezzlement or larceny of money is not sustained by proof of the embezzlement or larceny of a bank draft or check." State v. Mispagel, 207 Mo. 557; State v. Casselton, 255 Mo. 210; State v. Schilb, 130 Mo. 142; State v. Crosswhite, 130 Mo. 358; State v. Dodson, 72 Mo. 283; State v. Wissing, 187 Mo. 106; State v. Bacon, 170 Mo. 161; Carr v. State, 104 Ala. 43; Carter v. State, 53 Ga. 326; Goodhue v. People, 94 Ill. 37; Weimer v. People, 186 Ill. 503; Hamilton v. State, 60 Ind. 153; Com. v. Weinfield, 45 Mass. 468; Com. v. Wood, 142 Mass. 459; Baker v. State, 31 Ohio, 314; Block v. State, 44 Tex. 620. (4) The allegation that defendant obtained \$500 in money from Metropolitan Street Railway Company is not sustained by proof that he received a check from Oldham & Henderson for \$250 payable to May Dobbins, which he delivered to her. Leiske v. State, 131 S. W. 1126; same case, 60 Tex. Crim. App. 276; State v. Daniel, 83 S. C. 309; Jamison v. State, 37 Ark. 445. "The allegation of ownership of property obtained by false pretenses in an information for false pretenses is material, and must be proved as laid." Martins v. State, 8 Pac. 709; same case, 17 Wyo. 319; Owens v. State, 83 Wis. 496.

Frank W. McAllister, Attorney-General, and S. E. Skelley, Assistant Attorney-General, for the State.

(1) The indictment is sufficient. (a) An indictment for obtaining property by false pretenses is sufficient, if the language used sets forth the elements of the

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offense, designates the person charged and indicates to him the crime of which he is accused. 11 R. C. L. 857; State v. Smallwood, 68 Mo. 194; State v. Lichliter, 95 Mo. 405; State v. Donaldson, 243 Mo. 472; State v. Foley, 247 Mo. 628; State v. Young, 266 Mo. 730; State v. Loesch, 180 S. W. 878. (b) It is sufficient to allege in the indictment that the defendant, with criminal intent, designed the commission of the criminal act charged and employed an agent to carry out his purpose. Bishop's New Criminal Law (8 Ed.), secs. 310, 473; State v. Potter, 125 Mo. App. 472; State v. McCance, 110 Mo. 401; Nall v. State, 34 Ala. 262; State v. Bacon, 40 Vt. 456; Commonwealth v. Sacks, 43 L. R. A. (N. S.) 2, note. (2) The instructions, as a whole, are properly based on the facts in evidence, cover every phase of the case, correctly and fully state the law applicable thereto and are substantially correct. State v. Shout, 263 Mo. 375; State v. Young, 266 Mo. 730; State v. Loesch, 180 S. W. 878. (3) This case should not be reversed or remanded because of alleged variance between the allegations of the indictment and the proof. (a) It is not objected that there is a total failure of proof, nor could there be, as the evidence of defendant's guilt is ample to justify its submission to the jury. (b) Variance between charge and proof must be raised in and be passed on by the trial court, and cannot be raised for the first time on appeal. R. S. 1909, sec. 5114; State v. Barker, 64 Mo. 285; State v. Wammack, 70 Mo. 411; State v. Sharp, 71 Mo. 221; State v. Smith, 80 Mo. 520; State v. Ballard, 104 Mo. 637; State v. Sharp, 106 Mo. 109; State v. Harl, 137 Mo. 256; State v. Dale, 141 Mo. 288; State v. Waters, 144 Mo. 347; State v. Decker, 217 Mo. 320; State v. Starr, 244 Mo. 173; State v. Foley, 247 Mo. 634. (c) Under an indictment alleging that defendant, by false pretenses, obtained money of another, proof that he so obtained a check by means of which he accomplished his purpose, is sufficient to sustain said allegation. Bishop, New Criminal Law (8 Ed.), sec. 483; State v. Foley, 247 Mo. 634. (d) The receivers of the Metropolitan

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Street Railway Company were but officers of the court, appointed to take possession of and manage the property of said company, and were, in effect, mere agents. 1st. Receiver appointed by Federal Court must manage property under his custody according to valid laws of the State where such property is situated. U. S. Compiled Statutes 1913, sec. 1047; 4 Federal Statutes Annotated, p. 386. 2nd. The appointment of a receiver, in the absence of statute, does not vest him with any title to the property in controversy, but merely gives him right to possession. High on Receivers (4 Ed.), secs. 5, 134; Alderson on Receivers, secs. 196, 197; 34 Cyc. 183, 184; Rogers Hdwe. Co. v. Bldg. Co., 132 Mo. 453. 3rd. There is no statute in Missouri vesting title to property under his control in receiver. Rogers Hdwe. Co. v. Bldg. Co., 132 Mo. 453. 4th. The title and ownership of property is undisturbed by the appointment of a receiver or the possession of said property thereby. High on Receivers (4 Ed.), sec. 134; Alderson on Receivers, secs. 4, 196, 197, 198. 5th. In an indictment against a person who has wrongfully taken or procured property in the possession of a receiver, ownership thereof is properly alleged in the name of the original owner. State v. Rivers, 60 Iowa, 381; State v. Coss, 12 Wash. 673. (e) Proof of obtaining, by defendant, property charged, through an agent is sufficient. Kelley's Crim. Law, sec. 23; 1 Bishop's Crim. Law, sec. 264; State v. Potter, 125 Mo. App. 472; State v. Bockstruck, 136 Mo. 350; State v. McCance, 110 Mo. 401; State v. Starr, 244 Mo. 173.

FARIS, J.—Defendant, having been convicted in the criminal court of Jackson County, upon an indictment charging him with obtaining the sum of \$500 by false pretenses, and having had assessed against him as punishment therefor imprisonment in the State Penitentiary for a term of four years, after the conventional motions, has appealed.

An attack has been made upon the sufficiency of the indictment in this case. It is necessary therefore to set

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it forth in full herein. Formal parts, signatures, and verification omitted, this indictment reads thus:

"The Grand Jurors for the State of Missouri, duly impaneled, sworn and charged to inquire, within and for the body of the county of Jackson, upon their oaths present and charge that B. W. Small, Jennie L. Denham and May Dobbins, whose Christian names in full are unknown to said jurors, late of the county aforesaid, on the 12th day of April, 1915, conspiring, combining and confederating together for the purpose of cheating the Metropolitan Street Railway Company, a corporation organized and existing according to law, of its money, goods, chattels and personal property, did then and there unlawfully, feloniously and designedly with the felonious intent then and there to cheat and defraud the said Metropolitan Street Railway Company, a corporation as aforesaid, of its money, goods chattels, and personal property, represent, pretend and say to one John H. Lucas, the agent, attorney and servant of the Metropolitan Street Railway Company, a corporation as aforesaid, that on the 19th day of December, 1914, the said Jennie L. Denham and May Dobbins were then and there passengers upon a certain line known as the County Club Line of the Metropolitan Street Railway Company, a corporation, as aforesaid, and whilst they were passengers as aforesaid and being transported from a point at or near Forty-third Street and Main Street, to their homes at 1015 Locust Street, in Kansas City, Jackson County, Missouri, said car at or near Twenty-fourth Street and Grand Avenue, Kansas City, Jackson County, Missouri, was brought into violent contact and collision with the car of another company, which was known and designated as the Strang Line, and which said car at that point uses the tracks of the Metropolitan Street Railway Company, a corporation, as aforesaid, and as a result of the collision between the two cars, as aforesaid, that the said Jennie L. Denham and the said May Dobbins were then and there jerked and thrown in such a manner in said car that they received permanent and lasting injuries to their bodies; that their backs were wrenched and strained; that all the internal organs of the said

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Jennie L. Denham and May Dobbins were injured; that they received a shock to their entire nervous systems, and as a result of the collision between the said car of the Metropolitan Street Railway Company, a corporation, as aforesaid, and the car of the Strang Line, as aforesaid, they received permanent and lasting injuries as herein-before set out.

"And furthering their design to cheat and defraud, they, the said B. W. Small, Jennie L. Denham and May Dobbins, and each of them, did then and there unlawfully, feloniously and designedly employ and consult an attorney at law, to-wit, one Milton J. Oldham, and did then and there place in the hands of the said Milton J. Oldham a statement signed by the said Jennie L. Denham and May Dobbins, setting out the collision between the two cars and the injuries received by them, the tenor and purport of which said statement is to these jurors unknown; and that the said Milton J. Oldham, acting as the attorney for the said Jennie L. Denham and May Dobbins, did then and there communicate to John H. Lucas, the agent, attorney and servant of the said Metropolitan Street Railway Company, a corporation, as aforesaid, and did then and there show and exhibit to the said John H. Lucas said statement, purported to be the statement of the said Jennie L. Denham and the said May Dobbins, setting out that they were then and there passengers upon a Country Club car, as aforesaid, and were on their way back to their homes in northerly direction in Kansas City, Jackson County, Missouri, when said car then and there collided with a car known as the Strang Line car, which uses the said Metropolitan Street Railway Company's tracks at or near Twenty-fourth Street and Grand Avenue in Kansas City, Jackson County, Missouri, where the said collision took place. And the said John H. Lucas, relying on the false and fraudulent statements communicated to him by the said Milton J. Oldham, the attorney and agent of the said Jennie L. Denham and May Dobbins, to be true, and being deceived thereby, was induced by reason thereof, to pay, and did then and there pay to the said May Dobbins the sum of five hundred dollars lawful money of the

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United States of the value of five hundred dollars, of the money, goods, chattels and personal property of the said Metropolitan Street Railway Company, a corporation, as aforesaid, and the said B. W. Small, Jennie L. Denham and May Dobbins, by means and by use of the false and fraudulent statements and pretenses so communicated to the said John H. Lucas, the agent, attorney and servant of the said Metropolitan Street Railway Company, a corporation, as aforesaid, by them the said B. W. Small, Jennie L. Denham and May Dobbins, did obtain of and from the said Metropolitan Street Railway Company, a corporation, as aforesaid, the sum of five hundred dollars of the money, goods, chattels and personal property of the said Metropolitan Street Railway Company, a corporation as aforesaid.

"Whereas, in truth and in fact, that on the said 19th day of December, 1914, the said Jennie L. Denham and May Dobbins were not then and there passengers upon a certain line known as the Country Club Line, which said Country Club car collided with a car known and designated as the Strang Line car, at Twenty-fourth Street and Grand Avenue in Kansas City, Jackson County, Missouri; and that the said Jennie L. Denham and May Dobbins were not then and there jerked and thrown in such a manner in said car on account of said collision that they received permanent and lasting injuries to their bodies; that their backs were not wrenched and strained; that all the internal organs of the said Jennie L. Denham and May Dobbins were not injured; and that they did not receive shocks to their entire nervous systems, and that they did not receive permanent and lasting injuries as a result of the collision between the said car of the Metropolitan Street Railway Company, a corporation, as aforesaid, and the car of the Strang Line, as aforesaid, all of which they, the said B. W. Small, Jennie L. Denham and May Dobbins then and there well and truly knew, against the peace and dignity of the State."

The foregoing indictment forecasts the facts in this case, as these facts were shown by the evidence, and this evidence tended to prove the various allegations of the indictment. There was a variance as to the nature of

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the property obtained, since the evidence conclusively showed that a check of the receivers of the Metropolitan Street Railway Company formed the medium of payment, instead of lawful money of the United States, as the indictment charged. And, as foreshadowed in the last sentence above, the Metropolitan Street Railway Company was shown by the evidence to have been at all the times set out in the indictment in the hands of certain receivers who were holding and operating the property of said railway under orders of the Federal Court.

Such other facts as we may deem essential to an understanding of the points which we find it necessary to discuss, will be found in our opinion.

The contentions made are numerous. In the view which forces itself on us, it will not be necessary to consider all of these complaints.

I. It is most ably urged that there is upon this record a fatal variance between the proof and the allegations in the indictment, in that the indictment alleges that the property obtained by means of false **Variance** pretenses was lawful money of the United States; whereas the proof conclusively shows that the thing of value actually obtained was a check for \$500. There was, however, nothing said by defendant touching this alleged variance till he got into this court on appeal. He did not raise the question of variance before the learned trial judge even in his motion for a new trial. By the provisions of Section 5114, Revised Statutes 1909, the trial judge must be allowed an opportunity to pass upon the question of fatal variance *vel non*. [State v. Ballard, 104 Mo. l. c. 637.]

The above section does not mean that error may not here be successfully bottomed on the trial court's abuse of the discretion lodged in him, by the provisions thereof. It does, however, require that the error urged be saved by an objection and an exception, or (in a proper situation) by an exception made in the trial court. If such alleged variance be properly and timely called to the attention of the trial court, and he abuse the discretion lodged in him by the above statute, we may then review

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his action, and if in such case we find that the trial court should have allowed the variance, we may reverse because he did not do so. But the statute is clear that before error may be in this court bottomed on an alleged variance, the trial court must be first allowed to pass upon that question. Since no such opportunity to pass upon this contention was given to the court *nisi*, it results that this contention must be disallowed.

II. Defendant insists most earnestly that the indictment herein is bad, and that the trial court erred in overruling the motion in arrest, wherein **Indictment.** the sufficiency of this indictment was challenged. We think this contention must be sustained. We pointed out in the case of State v. Young, 266 Mo. 723, as succinctly as we were able, the general contents of a sufficient indictment for the crime of obtaining money under false pretenses. Even the tyro at law will keenly appreciate the difficulty, amounting in practice to an impossibility of prescribing any set form for such an indictment. The aspects of such crimes are Protean; scarcely any two cases being found which are alike, as to their constitutive facts. So the best that may be done in prescribing a form for indictments in such cases is to prescribe a general, or skeleton form, which shall merely embrace the necessary general allegations, leaving specificness to be eked out in any particular case by averments of the true facts of such case. Measured by general rules, which we have announced (State v. Young, *supra*; State v. Fraker, 148 Mo. 143) we are constrained to hold that the indictment here is bad. It fails to aver that Oldham, the attorney through whose hands the false and fraudulent statement was conveyed to the attorney and agent of the Metropolitan Street Railway Company, was at the time of so conveying and transmitting such statement, the agent of the defendant in that behalf. The indictment does charge that said Oldham was, in the fact of transmitting the false and fraudulent statement to one Lucas, the agent and attorney of Jennie

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Denham, and May Dobbins, who are the accomplices of the defendant in the felony charged; but however sufficient this fact may have been as a matter of proof under the charge of conspiracy, it was not a sufficient charge in the indictment. The indictment also incorrectly charges that the statement transmitted to Lucas merely "*purported*" to be the statement of Jennie L. Denham and May Dobbins. It was necessary that the false and fraudulent statement upon which Lucas was induced to act, and upon which he did act should be *the statement* of Jennie L. Denham, or May Dobbins, and not merely the purported statement of one, or either, or both of them. Howsoever much an actual statement might have availed to work fraud and deception upon Lucas, it might well be that the law would not permit Lucas to be deceived in a felony case like this upon the color of a mere purported statement. Furthermore the indictment fails to charge that Oldham in transmitting and conveying the statement, or statements, of Denham and Dobbins to Lucas, acted in that behalf upon the procurement or instigation of the defendant. This was a necessary allegation. [State v. Fraker, 148 Mo. 143.] It is true that the indictment avers that defendant and his accomplices consulted and employed one Oldham, an attorney-at-law, and placed the statement in the hands of the latter, and that such attorney of Denham and Dobbins communicated the statement to Lucas. It was necessary to charge in addition to the above that Oldham did all of these things upon the procurement of defendant and defendant's co-indictees. For these reasons we are convinced that the motion in arrest, bottomed upon the insufficiency of the indictment herein, should have been sustained.

III. The contention so strenuously urged upon our attention, that the property obtained by the false pretenses alleged was the property of the receivers of the Metropolitan Street Railway Company, *Ownership.* and not that of the above company, as laid in

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the indictment, is we think untenable. For while the proof showed that when the cheat in question was worked on the Metropolitan Street Railway Company, this railway was in the hands of certain receivers appointed by the Federal Court, such latter fact was not, in our view, a variance. The effect of a receivership ordinarily is not to transfer title to the property of the company under receivership to the receivers. It usually has the effect to change the possession of the property of the company, so that for the purpose of an indictment for larceny or embezzlement, or obtaining money under false pretenses it may become permissible to allege ownership in him who has the possession; yet since it does not usually (and lacking a definite showing to the contrary we must assume this to be the usual sort of ordinary court receivership of a corporation) have the effect to transfer the title of the property of the corporation to the receivers (34 Cyc. 183), the ownership of the property alleged to have been obtained was permissibly averred to be in the company itself.

IV. Some complaint is made of the instructions; particularly as to instruction one. We find no defects in this instruction, which are not referable to the insufficiency of the indictment. The instruction attacked fairly follows the indictment and the evidence adduced. This was proper; but since there were errors in the indictment, these same errors crept into this instruction. When the indictment is recast in accordance with the views we express herein, we have no doubt the instructions will be recast so as to conform to the necessary changes made in the indictment.

Other errors are called to our attention, but since these are such as will no doubt be avoided upon another trial we need not lengthen these views by a discussion of them. For the error noted let the case be reversed and remanded for a new trial.

All concur.

THE STATE v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

Division Two, December 4, 1917.

APPELLATE JURISDICTION: Construction of Federal Statute. The Supreme Court does not have appellate jurisdiction of a cause wherein a railroad company was fined one thousand dollars for shipping cars of cattle from Iowa into Missouri without having a certificate of inspection attached to the waybill, as provided by Sec. 717, R. S. 1909, on the theory that the Federal law on the subject has supplanted the State statute, and wherein the position of the State is not that the Federal statute is void, or that Congress had no power to pass it, but that it does not cover the subject-matter. The case does not involve the validity of the Federal statute, or the constitutionality of the State statute, but merely the construction of the Federal act.

Appeal from Grundy Circuit Court.—*Hon. Fred Lamb*, Judge.

TRANSFERRED TO KANSAS CITY COURT OF APPEALS.

Fred S. Hudson and *E. R. Sheetz* for appellant.

Frank W. McAllister, Attorney-General, for the State.

WILLIAMS, J.—Upon an information charging it with the violation of Section 717, Revised Statutes 1909, in that it shipped three carloads of cattle from Waucoma, Iowa, to Galt, Missouri, without having a certificate of inspection attached to the waybill as provided by certain rules promulgated by the Governor, State Veterinary and State Board of Agriculture under the authority of said statute, the defendant was tried before the circuit court of Grundy County, found guilty and a fine or penalty in the sum of one thousand dollars was imposed. Defendant appealed.

State v. C., M. & St. P. Ry. Co.

The only grounds now urged by the learned counsel for appellant in seeking a reversal of the judgment are stated in the brief as follows:

"First, that defendant's motion to quash the information should have been sustained, because in issuing of the rules and regulations by the Governor, the State Veterinary and the State Board of Agriculture, they failed to comply with the provisions of Section 717, and that the rules are broader than the statute, and that from first to last in the issuing of said rules and regulations the statute was in no wise followed, and as this is a penal statute subject to the rules of strict construction, nothing can be taken by intendment or read into the statute or a construction put upon it that the language of the statute does not fully bear out.

"Second, its demurrer should have been sustained, because it was an interstate shipment, and as Congress has legislated upon this subject, passed a quarantine law governing the shipment of cattle from one State into another the Federal law would prevail and the State law must therefore yield to the Federal, and if defendant is liable to a fine at all it would be under the Federal law and not under the State."

A suit under the above statute being in the nature of a suit to recover a penalty or at most to impose a fine for the commission of a misdemeanor (as defined in the statute), the amount of the penalty or fine imposed being only \$1000, this court would be without jurisdiction of the appeal unless some constitutional or Federal question is presented for our review.

A mere reading of the alleged grounds of error above mentioned will disclose that no such question is there presented. The validity of no Federal statute is drawn in question nor is any portion of our State or Federal Constitution sought to be construed. The appellant's position is, that Congress has legislated concerning this exact subject-matter and that therefore the Federal statute supplants the State statute. The position taken by the State is not that the Federal statute is void, or that Congress has no power to pass such

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an act, but that the Federal statute mentioned does not cover the subject-matter of this case. Under such circumstances a determination of the case involves not the validity, but merely the construction of the Federal act, and hence no question is involved conferring jurisdiction here. [Art. 6, sec. 12, Mo. Constitution; Carlisle v. Railroad, 168 Mo. 652; Live Stock Com. Co. v. C., M. & St. P. Ry., 157 Mo. 518; Schwyhart v. Barrett, 223 Mo. 497, l. c. 499; Specialty Co. v. Glass Co., 243 Mo. 356.]

The cause is therefore ordered transferred to the Kansas City Court of Appeals for determination. All concur.

THE STATE, Appellant, v. GOBER MORRIS.

Division Two, December 4, 1917.

1. **GAMBLING DEVICE:** Poker Table. A poker table not being one of the devices enumerated in Sec. 4750, R. S. 1909, it is necessary that the indictment point out in what manner the table was adapted to playing games of chance.
2. ____: ____: Used in Connection With Cards. It is not the game, but the device, at which Section 4750 is aimed. The use of cards and poker chips in connection with the poker table, where they are not charged to be a part of the device, does not make the table a gambling device.
3. ____: ____: ____: Indictment. An indictment which simply charges that defendant set up and kept a certain table and gambling device, to-wit, a poker table, which was adapted and designed for the purpose of playing games of chance, and that cards and poker chips were used on said table for the purpose of playing games of chance, but does not charge that defendant kept and set up or furnished the cards or chips, or in what manner the table was adapted or designed for the purpose of playing games of chance, is defective.
4. ____: Playing at Home. Section 4750, Revised Statutes 1909, does not prohibit one from allowing gambling on his premises. Another section (Sec. 4753, R. S. 1909) covers that offense.

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Appeal from Randolph Circuit Court.—*Hon. A. W. Walker, Judge.*

AFFIRMED.

Frank W. McAllister, Attorney-General, and George V. Berry, Assistant Attorney-General, for the State.

(1) This indictment is good and should have been so held by the trial court. It charges every essential element of the crime it denounces in plain, clear and careful language. It informs the defendant of the crime with which he is charged and meets every requirement of a correct indictment under the statute. Sec. 4750, R. S. 1909; Kelley's Crim. Law and Prac., sec. 950; 20 Cyc. 906; State v. Holden, 203 Mo. 584; State v. Locket, 188 Mo. 422; State v. Mathis, 206 Mo. 610; State v. Solon, 247 Mo. 675; State v. Davis, 203 Mo. 617; State v. McKee, 212 Mo. 145; State v. Lee, 228 Mo. 492; State v. Rosenblatt, 185 Mo. 120; State v. Leaver, 171 Mo. App. 373; Portis v. State, 27 Ark. 360; Euper v. State, 35 Ark. 629; Riley v. State, 120 Ark. 450; Mimms v. State, 88 Ga. 458; Kolshorn v. State, 97 Ga. 343; Huff v. Comm., 14 Gratt 648; Comm. v. Schatzman, 118 Ky. 628; Toney v. State, 61 Ala. 1; Wren v. State, 70 Ala. 1; State v. Turner, 87 Kan. 451. The indictment is sufficiently definite as to time and place. Time was not of the essence of the offense and did not need to be stated more definitely. Any time within three years prior to the date of the finding of the indictment was sufficient. The indictment charges the offense to have been committed in Randolph County, and is sufficiently definite as to place. Sec. 5115, R. S. 1909; State v. Moore, 203 Mo. 626; State v. Ward, 74 Mo. 255; State v. Magrath, 19 Mo. 680; State v. Wade, 267 Mo. 266; State v. Fields, 262 Mo. 163; State v. Lee, 228 Mo. 494; State v. Wister, 62 Mo. 593; State v. Wilcoxen, 38 Mo. 372.

Whitecotton & Wight for appellant.

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WHITE, C.—The State appeals from an order of the circuit court of Randolph County sustaining a motion to quash an indictment against the defendant, which indictment, omitting caption and signature, is as follows:

"The grand jurors for the State of Missouri, duly impaneled, sworn and charged to inquire within and for the body of the county of Randolph in the State of Missouri, upon their oaths present and charge that Gober Morris, at the county of Randolph, in the State of Missouri, on the ____ day of _____, 1916, did unlawfully and feloniously set up and keep a certain table and gambling device, to-wit, a poker table, on which said table a pack of cards and poker chips were then and there used and which said table was commonly called a poker table, and was adapted and designed for the purpose of playing games of chance for money and property and by means of which said table, pack of cards and poker chips certain games of chance commonly called poker, were then and there played for money and property, and the said Gober Morris did then and there unlawfully and feloniously entice, induce and permit divers persons, to-wit, Kirt Wilcox, Mike Marietta, Hughey Smith, Charles Horn, Pluggy Moore, Roy Adams, Joe Togliatti and divers other persons to these grand jurors unknown, to play and bet at and upon said gambling device; against the peace and dignity of the State."

It is an attempt to charge the defendant with keeping a gambling device under Section 4750, Revised Statutes 1909. An analysis of this indictment shows that it alleges:

That defendant did set up and keep a certain table and gambling device, to-wit, a poker table, which was adapted and designed for the purpose of playing games of chance, etc.

It further alleges that a pack of cards and poker chips were used on said table for the purpose of playing games of chance, but it does not allege that the defendant kept and set up or furnished the cards or chips. For aught that is charged in the indictment the

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poker chips and cards which were alleged to have been used on the table were furnished by the players or some one other than the defendant.

It is not stated in what manner the table was adapted and designed for the purpose of playing games of chance. The allegation is that "by means of which said table, pack of cards, and poker chips," games of chance were played. This negatives the idea that the table, for which alone the indictment alleges defendant was responsible, could have been by itself a gambling device.

Informations in this form have been held insufficient by this court in various cases. [State v. Harper, 190 S. W. 272; State v. Wade, 267 Mo. 249.]

That section was formerly construed in a way to hold an indictment, such as the one under consideration here, sufficient, but in the case of State v. Wade this court expressly overruled these earlier decisions. A poker table not being one of the devices enumerated in Section 4750, it would be necessary to point out in what manner a table was, or could be, adapted to poker playing. For anything that appears in the indictment, and for aught this court knows about the game, one table is as well "adapted" for that purpose as another.

Counsel for the State urge that the use of cards and poker chips in connection with the table made the table a gambling device. It is not the game but the *device* at which the statute is aimed. The Legislature did not intend, by this section, to prohibit one from allowing gambling on his premises, because there is another section of the statute, Section 4753, which covers that offense. Possibly it was the intention that the two sections should reach every form of permitting or inducing gambling by persons who profit by it.

If the indictment had stated that the defendant set up and kept a gambling device, to-wit, a table, cards and poker chips; that the said table was equipped with said cards and poker chips; and the said table, cards and poker chips were by him thereby adapted, devised and designed for the purpose of playing games of chance

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(or that by the use of packs of cards and poker chips upon and in connection with said table the same were adapted, devised and designed for the purpose of playing certain games of chance), commonly called poker, and became and thereby was a gambling device, to-wit, a poker table, and that by means of said table, pack of cards and poker chips certain games of chance commonly called poker were played, and that defendant enticed, etc., or words of similar import, then such information would have been sufficient under the ruling in the Wade case and in the Harper case.

The judgment of the circuit court is affirmed.

Roy, C., concurs.

PER CURIAM:—The foregoing opinion by *WHITE, C.*, is adopted as the opinion of the court. All of the judges concur.

THE STATE v. WALTER MILLS, Appellant.

Division Two, December 4, 1917.

1. **INSTRUCTION: Assumption of Defendant's Guilt.** An instruction telling the jury that "flight raises the presumption of guilt, and if you believe from the evidence that the defendant, after having stabbed and killed Philip Carpenter," etc., where the stabbing was not admitted by defendant, but unequivocally denied by him, is erroneous, in that it assumes that defendant "stabbed and killed Philip Carpenter." Even though the great weight of the testimony and defendant's previous extra-judicial confession unerringly point to the falsity of his denial, it is still the province of the jury to decide whether or not it is false.
2. ——: **Flight.** It is proper to give an instruction on the subject of flight where the facts show that defendant four days after the stabbing of deceased left the scene of the crime and went to a distant city and was there shortly afterwards arrested at a place and amid environments which might well argue an attempt at concealment; but the instruction should aptly embody the explanation which defendant gives on the witness stand of his alleged flight, or reason for his presence in said city.
3. **IMPEACHMENT: Former Conviction in Police Court.** It was error to permit the defendant, being tried for a felony, to be asked

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by the State on cross-examination, in an effort to impeach him as a witness, whether he had ever been convicted of a crime, and upon his denial to permit the State to ask him if he had not been convicted of vagrancy in the police court, and upon his further denial, to call the police judge, in rebuttal, and permit him to show by the records that defendant had been convicted of vagrancy in said court.

4. _____: _____: **Criminal Offense.** A conviction of vagrancy in a police court in violation of a city ordinance is not a conviction of a "criminal offense" within the purview of Sec. 6383, R. S. 1909. Those words are by the statute (Sec. 4925, R. S. 1909) confined to a conviction of a misdemeanor or felony in violation of a State law.
5. **INSTRUCTION ON MANSLAUGHTER:** Failure to Give. A failure to instruct on manslaughter in a murder case should be specifically assigned as error in the motion for a new trial.
6. _____: **When Authorized: No Assault.** Insulting actions or gestures without an assault upon the person will not reduce the homicide to manslaughter. Where upon a provocation unknown to defendant, his companion struck deceased and a fight ensued between them, and while defendant was looking on but taking no part in the fight deceased came near him and struck at him but failed to hit him, and thereupon defendant stabbed and killed deceased, there was no manslaughter in the case, and no instruction on the subject should have been given.
7. **INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE.** Where not a single element in the case depends for its proof upon circumstantial evidence no instruction on that subject should be given.
8. **ACCESSORIES: Before the Fact.** Where the fight which culminated in death came up suddenly, no words passed between defendant and his companion until deceased was stabbed and fell, and when deceased asked a negro woman who was talking with defendant's companion if there was "anything doing" the companion struck deceased and a fight between them began, and defendant without saying or hearing a word stood by with his knife in hand till a favorable opportunity presented itself and then stabbed and killed deceased, no instruction as to accessories before the fact should be given.

Appeal from Cooper Circuit Court.—*Hon. J. G. Slate, Judge.*

REVERSED AND REMANDED.

L. O. Schaumburg for appellant.

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(1) The court failed to instruct the jury as to all the law arising in the case, contrary to Sec. 5231, R. S. 1909. Whatever grades of crime the defendant's testimony tended to prove, should have been covered by appropriate instructions based upon his testimony, and the failure of the court so to instruct the jury constitutes reversible error. State v. Richardson, 194 Mo. 315; State v. Heath, 221 Mo. 565; State v. Sebastian, 215 Mo. 58; State v. Banks, 73 Mo. 592. (2) Defendant testified that the deceased first struck at him, whereupon he jumped back, pulled his hands out of his pockets and struck at deceased with a knife, and that when he struck at deceased, he did not intend to kill him. The jury were not instructed as to manslaughter in either degree. Defendant was clearly entitled under his testimony to have the jury instructed for a lower grade of homicide than either of the degrees of murder. State v. Palmer, 88 Mo. 572; State v. Branstetter, 65 Mo. 149; State v. Banks, 73 Mo. 592; State v. Partlow, 90 Mo. 626. (3) Defendant was convicted on circumstantial evidence alone, and the court, therefore, should have properly instructed the jury in reference to this character of evidence. No such instruction was given. State v. Moxley, 102 Mo. 388. (4) Testimony was introduced to prove verbal admissions charged to have been made by defendant. A cautionary instruction as to verbal admissions should have been given by the court. State v. Moxley, 102 Mo. 390. (5) The testimony in this case is insufficient on which to base a flight instruction. The lone fact that defendant went to another point within the State several days after the homicide was committed and before he was charged with the crime for which he was tried, is not sufficient basis for an instruction to the effect that defendant fled the country, and tried to avoid arrest and trial. State v. Evans, 138 Mo. 127. (6) It was the absolute right of the defendant to have the jury determine who in fact stabbed and killed the deceased, and the court invaded that right in assuming in the instruction that defendant stabbed and killed Philip Carpenter, as charged in the information. The defend-

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ant positively denied that he stabbed the deceased. The determination of this controverted fact, by the jury, was of the utmost importance to defendant, for, if it believed defendant's testimony touching this point, he could be convicted of no crime under the information in this case. State v. Vaughan, 141 Mo. 521; State v. Lee, 182 S. W. 974. (7) Defendant sought to explain his departure from the community in which the homicide was committed, and his testimony tended to show that his purpose for going away was not to avoid arrest and trial, but that he and four others arranged previous to March 31, 1917, to go to Kansas City, Mo. Instruction H. disregarded defendant's testimony touching this point, and is not broad enough to include defendant's explanation. State v. King, 78 Mo. 558; State v. Harris, 232 Mo. 324; State v. Fairlamb, 121 Mo. 137; State v. Schmulbach, 243 Mo. 539; State v. Miller, 255 Mo. 231. (8) Under the evidence, the jury should have been required to find that defendant, if guilty of the crime, was the person who delivered the fatal blow. The record in this case discloses no evidence warranting the conviction of defendant on the ground that he was present, "aiding and abetting" in the perpetration of the alleged homicide. There being no evidence to support it, the court erred in giving the instruction. State v. Chambers, 87 Mo. 406. (9) The court erred in requiring defendant to testify as to a proceeding against him in a police court. The violation of a city ordinance is not a criminal offense and this court has uniformly held that a prosecution for the violation of a city ordinance is a civil proceeding. St. Louis v. Smith, 10 Mo. 439; Delaney v. Police Court, 167 Mo. 678; State v. Muir, 164 Mo. 610; St. Louis v. Tielkemeyer, 226 Mo. 140. Sec. 6383, R. S. 1909, therefore, does not authorize a defendant in a criminal case to be impeached by the introduction of evidence to the effect that he was convicted for the violation of a city ordinance.

Frank W. McAllister, Attorney-General, and E. M. Connor, Assistant Attorney-General, for the State.
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(1) A general assignment in a motion for new trial that the court erred in failing to instruct on all the law governing the case is insufficient. Appellant must point out specifically in his motion for new trial wherein the court failed to instruct. *State v. Snyder*, 263 Mo. 668; *State v. Kretschman*, 232 Mo. 29; *State v. West*, 202 Mo. 128; *State v. Connors*, 245 Mo. 477; *State v. McGarver*, 194 Mo. 742; *State v. Delbitt*, 191 Mo. 51; *State v. Conway*, 241 Mo. 291; *State v. Dockery*, 243 Mo. 599; *State v. Sykes*, 248 Mo. 712. (2) Under the evidence in this case, the defendant was not entitled to an instruction on manslaughter. *State v. Miller*, 263 Mo. 335; *State v. Alcorn*, 137 Mo. 121; *State v. Johnson*, 129 Mo. 26; *State v. Melton*, 102 Mo. 683; *State v. Smith*, 114 Mo. 406; *State v. Musick*, 101 Mo. 260; *State v. Jones*, 86 Mo. 623; *State v. Sykes*, 248 Mo. 708. (3) The appellant's defense being self-defense, it was not error not to instruct the jury on circumstantial evidence. *State v. Gartrell*, 171 Mo. 489; *State v. Donnelly*, 130 Mo. 642; *State v. Fairlamb*, 121 Mo. 137; *State v. Robinson*, 117 Mo. 649. (4) The evidence was sufficient to give an instruction on flight. *State v. Lewkowitz*, 265 Mo. 628; *State v. Brooks*, 92 Mo. 556; *State v. Smith*, 114 Mo. 416; *State v. Griffin*, 87 Mo. 608; *State v. Walker*, 98 Mo. 95; *State v. Asa Sparks*, 195 S. W. 1031. (5) The evidence in this case fully supports the giving of the instruction as to accessories before the fact. *State v. Crabb*, 121 Mo. 554; *State v. Walker*, 98 Mo. 95; *State v. Nelson*, 98 Mo. 414; *State v. Miller*, 100 Mo. 606; Kelly's Criminal Law and Procedure (3 Ed.), sec. 47. (6) Prosecutions by a city are not criminal cases. They are civil in form only and of a quasi-criminal character. *State v. Gordon*, 60 Mo. 383; *In re Miller*, 44 Mo. App. 127; *Kansas City v. Clark*, 68 Mo. 588; *Carrollton v. Rohmberg*, 78 Mo. 547; *St. Louis v. Shoenbusch*, 95 Mo. 621. The municipality is the agent of the city and a prosecution by the city is a bar to a prosecution by the State for the same offense in the State courts. *Lynch v. Commonwealth*, 35 S. W. (Ky.) 264; 1 Dillon's Municipal Corporations (4 Ed.), secs. 367-368; *State v. Si-*

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monds, 3 Mo. 413; State v. Cowan, 29 Mo. 330; State v. Thornton, 37 Mo. 360; State v. Gordon, 60 Mo. 383. The courts of this State have always held that a conviction in a municipal court is a bar to the subsequent prosecution by the State for the same offense. State v. Simonds, 3 Mo. 414; State v. Cowan, 29 Mo. 330; State v. Hannah Thornton, 37 Mo. 361; Pilot Grove v. McCormick, 56 Mo. App. 530; State v. Freeman, 56 Mo. App. 579.

FARIS, J.—Defendant, tried in the circuit court of Cooper County, for murder in the first degree, for that, as it was charged in the indictment, he stabbed and killed one Philip Carpenter, was found guilty and his punishment assessed at death. From this conviction and the sentence bottomed thereon, he has, after the conventional motions, appealed.

The facts of this homicide as the record discloses them run about thus: On the night of March 31, 1917, Philip Carpenter (hereinafter for brevity called deceased), and one Louis Orr, both of whom were printers, were together in the town of Boonville. After having taken a number of drinks of liquor, until deceased was somewhat under the influence thereof, and until Orr, as he himself admits, was very drunk, they started about 11:30 o'clock at night down a certain alley in the town of Boonville, along which, it seems some considerable portion of the negro population of Boonville resides. After they had proceeded some little distance Orr stopped, but Carpenter kept going until he had reached a point somewhere near the center of the alley. Walking in front of deceased as he traversed this alley was one Stella Goosberry, a negress, who, it seems, lived with her husband in a house situate somewhere in the vicinity. This negro woman, who, as stated, was in front of deceased some little distance, and considerably in front of Orr, who had stopped, met about the center of the alley two negro men, one Ed. Porter, and defendant. This negress seems to have known both Porter and defendant; the former intimately, and the latter only casually. Upon meeting Porter and defendant, she complained to Porter that

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some men were following her, and asked him to stand at the point where she had met him, until she reached her home. Almost immediately after this, and while the three negroes were still near each other, deceased came up, and walking between Porter and the negro woman, said to the latter "is there anything doing?" Thereupon Porter struck, or struck at, deceased (it does not clearly appear which); the two engaged in a fight, and the negro woman ran. This woman was a witness in the case and the facts so far related turn almost wholly upon her testimony.

Shortly after this, Orr, who had accompanied deceased into the alley, came running out and stated to a man whom he met, that deceased was in trouble down the alley. The alarm spread and certain persons went down the alley, and found deceased lying therein, stabbed and fatally wounded. A knife had been driven into the back of his neck, at the point of juncture of the head with the spinal column, almost severing his head from his body. From this wound he died some twelve hours later.

For some days defendant was not suspected of this murder, but Orr, who had been the companion of deceased during the evening on which deceased was killed, was arrested and held in custody for some three or four days. Subsequently the defendant, who had left Booneville, and gone to Kansas City, was arrested and charged with this murder. Upon being arrested he confessed to the marshal and to the sheriff, that he had stabbed the deceased, and attempted to tell them fully and in detail how the murder was committed. He told these officers of his going through the alley with Porter; of the meeting of the negro woman by Porter and him, and of part of the conversation which the woman had with Porter. But he did not hear the remark made by deceased to the negro woman. He told of the fight between Porter and deceased, and touching his own connection therewith said that he stood by without taking any part for some time, but that he had his knife partly open in his pocket with his hand on it; that deceased in the course of the fight between him and Porter, came close to defendant and struck

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at him, and that thereupon he struck with his knife and stabbed deceased in the neck.

Defendant upon the trial testified as a witness in his own behalf. He there denied stabbing deceased at all, but did testify that deceased struck at him either with his hand or some weapon, it was too dark, he swore, for him to distinguish which, and that thereupon he struck at deceased with his hand, in which he held a knife; but that he did not touch deceased, and beyond striking at deceased when the latter struck at him, he took no part whatever in the fight between Porter and deceased. He denied having left Cooper County for the purpose of avoiding arrest and trial for the stabbing of deceased. He explained his presence in Kansas City by the statement that he and three others of his color and acquaintance had before the killing already agreed to go to Kansas City as soon as they were paid off, and that he went as soon as he got his money. Whether the other three went to Kansas City the record does not disclose.

At the close of defendant's cross-examination he was asked by counsel for the State, if he had ever been convicted of any crime, and he denied that he had been. Thereupon he was specifically asked by counsel for the State if he had not been convicted of vagrancy in the police court of the town of Boonville. He denied that he had ever been so convicted; whereupon, in rebuttal, the State offered the police judge, who testified that the records kept by the witness's predecessor showed that defendant had been convicted of vagrancy in the police court of the town of Boonville, on the 10th day of February, 1913.

The trial resulted, as stated, in finding defendant guilty of murder in the first degree, and in a sentence to death as punishment therefor.

Such other facts as may be necessary to an understanding of the points we find ourselves compelled to discuss, will be found in our opinion.

Defendant urges upon our attention numerous alleged errors. Many of these we find ourselves unable to review for lack of proper preservation of them for

review. Some of the points urged, but not properly saved, we find ourselves compelled to review, because they may arise upon the next trial, since, for errors appearing of record, we find it necessary to reverse and remand the case.

Among other matters urged, defendant complains that the learned trial court erred (1) in instructing the jury upon the presumption arising from flight, for that, (a) the facts shown by the record do not warrant any instruction upon the subject, and (b) the instruction given was bad; (2) in allowing defendant to be questioned, in an effort to impeach him about his conviction in the police court of vagrancy, and in offering testimony of such conviction, when defendant denied the fact; (3) in failing to instruct the jury (a) on manslaughter, and (b) on circumstantial evidence, and (4) in instructing the jury on accessories before the fact. These in their order.

I. The instruction given by the court on flight, read thus:

"The court instructs the jury that flight raises the presumption of guilt, and if you believe from the evidence that the defendant, after having stabbed flight. and killed Philip Carpenter, as charged in the information, fled the country, and tried to avoid arrest and trial, you may take that fact into consideration in determining his guilt or innocence."

It is clear that this instruction by its terms assumes defendant's guilt and begs the question upon the most vital issue in the case. It was the province of the jury to find and say whether the defendant "stabbed and killed Philip Carpenter," and not the province of the court to assume this fact as true. If the stabbing had been admitted by defendant and his defense had been self-defense, no harm would have flowed from this assumption. But here defendant unequivocally denied that he stabbed deceased, and while the great weight of the testimony, and even his own extra-judicial confessions, unerringly point to the falsity of his denial.

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yet we have uniformly held that the instructions must take their color from the evidence, and that it is error to disregard the defendant's testimony (State v. Weinhardt, 253 Mo. 629) unless the physical facts contradict such testimony beyond dispute or cavil. If, however, in the instant case the jury had seen fit to believe the testimony of the defendant, he was guilty of no crime and must have been acquitted. It was defendant's right to have the jury pass upon this vital issue as to who stabbed the deceased, and the court could not invade that right and assume that defendant did it. [State v. Vaughan, 141 Mo. 514; State v. Lee, *ante*, p. 121, 182 S. W. 972.]

Upon the contention that no instruction whatever upon the subject of flight was warranted by the facts, we are not able to agree with learned counsel. These facts were that on the Wednesday which followed the stabbing of deceased on Saturday night preceding, defendant left Cooper County and went to Kansas City, where he was shortly after arrested at a place and under environments which might well argue an attempt at concealment. We think that the jury had the right to consider whether defendant's admitted going away from the scene and county of the alleged homicide, was or was not for the purpose of avoiding arrest and trial for this crime. But we are likewise thoroughly convinced that the instruction (or a separate one) which leaves to the jury to find the intent with which defendant left Cooper County and went to Kansas City, ought also aptly to embody the explanation which defendant gave upon the witness stand of his alleged flight, or reason for his presence in Kansas City. [State v. Potter, 108 Mo. 424; State v. Fairlamb, 121 Mo. 137; State v. Harris, 232 Mo. 317; State v. Walker, 98 Mo. 95; State v. Sparks, 195 S. W. 1031.]

We are constrained to conclude that in the two before-mentioned the instruction on flight as given was bad, and that the giving thereof, in the form set out, constitutes reversible error.

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II. We are likewise of the opinion that the learned trial court erred in allowing defendant to be asked, in an effort to impeach him as a witness, whether he had not been convicted of vagrancy in the police court of the town of Boonville. It is true that defendant denied that he had ever been so convicted. If the matter had ended there, no harm with certainty could be said to have accrued to defendant. But upon denying the fact of conviction, the police judge was sworn and was allowed to contradict defendant by orally testifying that the police court records made by one of his predecessors showed defendant's conviction of vagrancy in February, 1913. We think this was error. Passing the question of the incompetency of the oral testimony of the police judge to prove what was shown by a record made by his predecessor (*State v. Woodward*, 191 Mo. 617), the testimony was rendered more hurtful by the fact that defendant was impeached by a showing that he had upon this matter of his conviction sworn falsely, as well as by the fact itself of a conviction for a thing which must have presented itself to the triers of fact as a criminal offense.

We are of the opinion that a conviction in a police court of a violation of the ordinances of a town or a city is not such a conviction as falls within the purview of section 6383, Revised Statutes 1909. Indeed, it was long doubted whether a conviction for a misdemeanor before a justice of the peace, or in a circuit court, was within the statute. This latter doubt was set at rest in the case of the *State v. Blitz*, 171 Mo. 530, where it was held that a conviction of a misdemeanor is a conviction "of a criminal offense" within our statute, which reads: "Any person who has been convicted of a *criminal offense* is, notwithstanding, a competent witness; but the conviction may be proved to affect his credibility, either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be con-

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cluded by his answer." [Sec. 6383, R. S. 1909.] (Italics are ours.)

We are of the opinion that neither by our decisions, nor by statute, is a conviction for vagrancy in a city court "a criminal offense" within the purview of the above quoted statute. For while the procedure, or some of it, in a prosecution for the violation of a town or city ordinance is criminal in form, that is, it follows the forms of the criminal procedure, we have nevertheless uniformly held that it is but a civil action to recover a debt or penalty due the city for the infraction of its ordinances. [St. Louis v. Tielkemeyer, 226 Mo. l. c. 141; State v. Muir, 164 Mo. 610.]

In the Tielkemeyer case, *supra*, it was said by VALLIANT, J.:

"In *City of Kansas v. Clark*, 68 Mo. 588, it was held that a prosecution under a city ordinance for keeping a gambling table contrary to the ordinance was not a prosecution for a crime, but a civil suit to recover a penalty, the court saying: 'Nor do we regard the violation of the ordinance under consideration as a crime, since "a crime . . . is an act committed in violation of a public law" (4 Black., Com., 5); a law co-extensive with the boundaries of the State which enacts it. Such a definition is obviously inapplicable to a mere local law or ordinance, passed in pursuance of, and in subordination to, the general or public law, for the promotion and preservation of peace and good order in a particular locality, and enforced by the collection of a pecuniary penalty.' That language was quoted and followed as the correct rule of law in *State v. Muir*, 164 Mo. 610, in which it was held that a conviction under a city ordinance against gaming was not a bar to a subsequent prosecution for the same act under the State statute; in that case the court said that the prosecution under the city ordinance was a civil action, and quoted Cooley's *Const. Lim.* (6 Ed.), p. 239, to sustain the doctrine. In *Canton v. McDaniel*, 188 Mo. 207, l. c. 228, the converse of the proposition was also held, that is, that an acquittal in a prosecution under the State statute

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was not a bar to a prosecution to recover the penalty prescribed in a city ordinance for the same act. In City of St. Louis v. DeLassus, 205 Mo. 578, it was again said that a prosecution under a city ordinance to recover a penalty was a civil action, and that an ordinance was not invalid because it forbade and imposed a penalty for an act which the State statute declared to be a crime and for which it prescribed a penalty, and also that the ordinance was not invalid because it imposed a higher pecuniary penalty for the offense than that imposed by the statute."

But, while they would appear to be sufficient, we are not called on wholly to rely upon the adjudged cases, to prove that a violation of a city ordinance is not a criminal offense. Our statute has by self-contained delimitations defined for us the meaning of this term. Section 4926, Revised Statutes 1909, quite obviously confines "criminal offense" to either a misdemeanor or a felony, as witness this language:

"The terms 'crime,' 'offense,' and 'criminal offense,' when used in this or any other statute, shall be construed to mean any offense, as well misdemeanor as felony, for which any punishment by imprisonment or fine, or both, may by law be inflicted."

This we think settles the question without the necessity of considering the evil which might well flow from our writing into the law that a citizen convicted of failing to shovel the snow from an abutting sidewalk, or of failing to park an automobile at the prescribed angle, could have such facts shown years afterward to impeach his veracity in a trial for murder, or rape, or treason.

III. Touching the complaint of defendant that the court erred in failing to instruct on manslaughter, it would be sufficient for the uses of our present discussion to say that the motion for a new trial does not with that specificness of assignment which we require, mention this alleged error. [State

**Instruction
on
Manslaughter.**

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v. Snyder, 263 Mo. 664.] This would suffice here, but since upon a new trial, which for the errors noted above we must order herein, the point may again arise, we would as well say that in our view there is no manslaughter in this case. It is at the best which may be said of it murder in the second degree.

We have had occasion in numerous cases to define manslaughter in the fourth degree, and to set out the necessary facts which must appear in a case before an instruction for this grade of homicide is warranted. [State v. Gordon, 191 Mo. l. c. 125; State v. Myers, 221 Mo. l. c. 620; State v. Heath, 221 Mo. l. c. 586.] In the case of State v. Myers, *supra*, this court said:

"In State v. Gordon, 191 Mo. l. c. 125, the rule as applicable to this subject was thus announced: 'At common law, words of reproach, howsoever grievous, were not provocation sufficient to free the party killing from the guilt of murder, nor were contemptuous or insulting actions or gestures without an assault upon the person, nor was any trespassing against lands or goods to have the effect to reduce the guilt of killing to a grade of manslaughter; the provocation must consist of personal violence. [East's Pleas of the Crown, 233; 4 Blackstone, Com., 201; State v. Wieners, 66 Mo. 13.] And the common law rule in this respect is firmly established in this State by a long line of decisions.'

Measured by this rule, there is no ground for an instruction on manslaughter in the fourth degree. It is manifestly alone upon the testimony of defendant, on which, if at all, we must find a basis for such an instruction. According to defendant, he and his companion Porter met deceased, whom defendant did not know, and against whom he harbored no disclosed enmity. Suddenly upon a provocation unknown to defendant, Porter struck deceased and a fight ensued between deceased and Porter. While defendant was looking on, but taking no part in this fight, deceased came around near him in the course of the melee and struck at defendant but failed to hit him. Thereupon defendant stabbed and killed deceased. So we hold that there was

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no manslaughter of any degree in this case upon the proof as the instant record shows it.

IV. Much of what we say above also applied to the complaint of defendant that there should have been given an instruction on circumstantial evidence. This point is not properly

Circumstantial Evidence. saved for review. But lest it again arise we would as well dispose of it by saying

that no instruction on circumstantial evidence was called for in this case. Not a single element in the case depended for its proof on circumstantial evidence. A man is found dying in an alley with his head almost severed from his body. A witness in the case sees a fight arise in the presence of defendant between the companion of defendant and the dead man. Defendant when arrested confesses that while his companion and deceased were fighting he stabbed deceased in the neck from behind. The facts refute the contention. The authorities are all one way in holding that in such a case it is not incumbent upon the trial court to instruct on circumstantial evidence. [State v. Bobbitt, 215 Mo. 10; State v. Crone, 209 Mo. 316; State v. Donnelly, 130 Mo. 642; State v. Robinson, 117 Mo. l. c. 663.]

V. Since this case must be retried, should the testimony which is pertinent be no stronger than it is upon the instant record, we think the instruction

Accessories. as to accessories before the fact should be omitted. The evidence discloses that the fight which culminated in the killing of deceased came up suddenly. No words passed between Porter and defendant till the deceased was stabbed and fell, so far as the record shows. When deceased asked the negro woman if there was anything doing Porter struck him and the fight began. Defendant without saying a word and without hearing a word, stood by with his knife in his hand, till a favorable opportunity presented itself, and he then stabbed and killed deceased. Therefore while the distinctions be-

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tween principals and accessories before the fact have been so far obliterated in this State as to render a discussion of the subject largely academic, we see no warrant for the giving of this instruction under the facts here. Defendant either stabbed and killed deceased, or he was merely an innocent bystander, and should be tried as a principal.

Other matters are urged upon our attention, but all such fall into that large category of things and matters which will not necessarily happen again.

For the errors pointed out let the case be reversed and remanded for a new trial not inconsistent with what we have said herein. All concur.

THE STATE ex rel. LAWRENCE McDANIEL, Circuit Attorney of St. Louis, v. FRANK SCHRAMM.

In Banc, December 12, 1917.

1. **ASSESSOR: City of St. Louis: City or State Office:** Under the Constitution and statutes of this State and the charter of St Louis the assessor in said city does not derive his title to the office from the general statutes, as do assessors in other parts of the State, but from the charter framed in harmony with the Constitution.
2. _____: **Proviso Excepting St. Louis Out of General Statute: Enlargement to Include Said City.** The proviso of the general statute of 1900 (Sec. 11341, R. S. 1909) requiring the election at "the general election" of a county assessor in "the several counties of this State" (said proviso declaring that "this section shall not apply to the city of St. Louis"), if held to be invalid (not necessary to be decided), then the remainder of the act cannot be held to enlarge the territory embraced so as to include said city and so as to authorize the qualified voters of said city to elect an assessor at the general election in November or the Governor to appoint respondent to the office in case they do not so elect.
3. _____: _____: _____: **Intention as Manifested by Proviso.** Even though a proviso excepting a part of the State from the operation of a general statute be invalid, yet as it expressly excepts that part, it demonstrates the legislative intention not to apply the

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general provisions of the statute to the territory so excepted, and for the courts, by eliminating the proviso, to make the remainder apply to the whole State in its entirety, would be to give to the act an effect that is manifestly contrary to that intention, and would be judicial legislation.

4. ____: ____: ____: Validity of Proviso. In view of the fact that the proviso to the Assessor's Act of 1900 (Sec. 11341, R. S. 1909) expressly excepts the city of St. Louis from the operation of the act, and that the remaining part of the act cannot be enlarged to include the territory of said city or to authorize the Governor to appoint the respondent assessor for said city, it is wholly unnecessary, in a *quo warranto* to oust said appointee, to determine the constitutionality of said proviso. Yet it is certain that if the proviso is void, the whole act is void.

Held, by FARIS, J., that the proviso is not void; that long prior to the adoption of the Constitution of 1875 the city of St. Louis had been excepted from the operation of the general laws governing the election of assessors, and that Constitution did not nullify such exceptions unless they were inconsistent with the city charter or were repealed expressly or by necessary implication by some statute, and there is no such repealing statute, and the exception is embraced in the charter; and that, barring the effect of Section 11 of the Schedule, the Constitution operated with no more potency to repeal an existing special law than it did to repeal a general law; nor does the enactment of a general law *ipso facto* and necessarily repeal a local or special law, but in order to have that effect the two must be in irreconcilable conflict, or the legislative intent to prescribe one single authoritative rule must clearly appear.

Held, by WALKER, J., concurring, that the general statutes pertaining to the office of assessor would be utterly inapplicable to such an officer in the city of St. Louis, and incapable of enforcement there, and a review of them manifests a steadfast legislative purpose from the time of the adoption of the Constitution of 1875 to the present, to leave the control of the assessment of property to the city charter and ordinances; and, since a ruling that said proviso is invalid would necessitate the amendment of the entire body of the law relating to the duties of the assessor and the assessment of property, and prior to such amendment the city would be without power to assess property for purposes of taxation, the validity of the proviso should be upheld if it can be sustained under any reasonable interpretation.

Held, by WILLIAMS, J., dissenting, with whom GRAVES, C. J., and BLAIR, J., concur, that the proviso to Sec. 11341, R. S. 1909, is unconstitutional, and that the remaining portion

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of the act constitutes a valid statute complete in itself and is of such character as to justify the belief and presumption that the Legislature would have enacted it even though the proviso had been omitted or its invalidity been known.

Quo Warranto.

WRIT GRANTED.

Spencer & Donnell for relator.

(1) It is admitted that the State has the power to control the election of assessor of the city of St. Louis and to regulate the conduct of the office in precisely the same manner and to the same extent as it has power in relation to the assessors of the several counties of the State. (2) The State has expressly refused to act in regard to the assessor of St. Louis. Ever since the city was separated from the county in 1876 the State has expressly exempted the city from the statutory provisions relating to the office of assessor. Sec. 11341, R. S. 1909, and all the provisions of article 2, chapter 117. (3) The charter of St. Louis, both the charter of 1875 and the present charter of 1914, expressly make the city assessor a city office and provide for the election of the assessor and for the term of the office. Charter 1876, art. 4, sec. 1; art. 5, secs. 15, 18; Charter 1914, art. 15, secs. 4, 5, et seq.; Art. 8, secs. 1, 2, 3, et seq. (4) The provisions of the charter are operative until the State sees fit to regulate the office and to legislate upon the subject itself. State ex rel. v. Koeln, 270 Mo. 174; State ex rel. v. Watson, 71 Mo. 471; State ex rel. v. Walsh, 69 Mo. 408; State ex rel. v. Finn, 8 Mo. App. 341; State ex rel. v. Mason, 4 Mo. App. 377. (5) If the provision of Sec. 11341, R. S. 1909, which exempts St. Louis from its operation, is unconstitutional, then the entire article is unconstitutional and there is no statutory provision either for the city or for the counties relating to the office of assessor. Henderson v. Koenig, 168 Mo. 372; Township of Lodi v. State, 5 N. J. L. 402, 6 L. R. A. 57; State ex rel. v. Gordon, 236 Mo. 170. (6) The exemption of St. Louis by the Legislature from the general provisions regulat-

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ing county assessors is constitutional and valid. The State can legislate directly for St. Louis. *State ex rel. v. Mason*, 153 Mo. 52; *Kansas City v. Stegmiller*, 151 Mo. 204; *State v. Rawlings*, 232 Mo. 560; *Ex parte Loving*, 178 Mo. 194; *State ex rel. v. Mason*, 155 Mo. 486; *Spaulding v. Brady*, 128 Mo. 653; *State ex rel. v. Miller*, 100 Mo. 439. (7) The question is as to whether respondent is entitled to the office of assessor and the burden is on him to show good title to it, on the ground which he asserts, viz., that a vacancy existed in the office of assessor which authorized his appointment by the Governor. *State ex rel. v. Powles*, 136 Mo. 376. (8) The charter provisions are in harmony with the Constitution and laws of the State, for although the Constitution specifically provides (Art. 9, sec. 25) that the General Assembly shall have the same power over the city of St. Louis that it has over the counties of the State, and although the Assembly could, without doubt, assume the exercise of said power at any time, yet it has in fact expressly refused to exercise said power with relation to the office of assessor of St. Louis, and has made no provision whatever concerning the election of said official. Constitution, art. 9, secs. 20 and 22; Sec. 11341, R. S. 1909; *State ex rel. v. Koeln*, 270 Mo. 174; *State ex rel. v. Walsh*, 69 Mo. 408. (9) Sec. 11341, R. S. 1909, is entirely constitutional, and its provision excluding St. Louis from its operation is valid and binding. *State ex rel. v. Mason*, 153 Mo. 52; *Kansas City v. Stegmiller*, 151 Mo. 189; *Ex parte Loving*, 178 Mo. 203; *State v. Rawlings*, 232 Mo. 560; *State ex rel. v. Mason*, 155 Mo. 486; *Spaulding v. Brady*, 128 Mo. 653; *State ex rel. v. Miller*, 100 Mo. 439; *State ex rel. v. Roach*, 258 Mo. 565; *State ex rel. v. Telephone Co.*, 189 Mo. 99; *St. Louis v. King*, 226 Mo. 344. (10) If the proviso in Section 11341 which excludes the city of St. Louis be eliminated, the remainder of the section cannot be so construed as to include the city. Sec. 8057, R. S. 1909; *State ex rel. v. Gordon*, 236 Mo. 161; 36 Cyc. 977; 26 Am. & Eng. Ency. Law, 570.

Charles H. Daves, Amicus Curiae.

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Wilfley, McIntyre & Nardin and *E. F. Nelson* for respondent.

(1) The Constitution of 1875, in addition to providing authority for the adoption of a special charter by the city of St. Louis, provides that the city shall exercise some of the functions of counties with reference to the State government, and for such purposes the city is a political subdivision of the State as well as a municipal corporation. Sec. 23, art. 9, Constitution 1875; State ex rel. v. Dillon, 87 Mo. 487; State ex rel. v. Bus, 135 Mo. 337; Gracy v. St. Louis, 213 Mo. 387. (2) The Constitution expressly provides that the city of St. Louis shall be subject to the general laws of the State, and that all special laws applicable to St. Louis County shall be suspended by the Scheme and Charter. Secs. 20 to 25, art. 9, Constitution 1875. (3) The official who assesses property for the imposition of State taxes is a county official, and, as such, the establishment and regulation of his office can be accomplished only by the General Assembly. State ex rel. v. Imel, 242 Mo. 300; State ex rel. v. Koeln, 270 Mo. 174; Sheboygan Co. v. Parker, 70 U. S. 93; Sec. 14, art. 9, Constitution 1875. (4) The city of St. Louis, as a political subdivision of the State, is in no special class and legislation undertaking to exempt it from general laws, applying to the exercise of powers or functions peculiar to such subdivision, is in violation of the Constitution. State ex rel. v. Tele. Co., 189 Mo. 99; St. Louis v. King, 226 Mo. 344; Sec. 53, art. 4, Constitution; Kansas City v. Stegmiller, 151 Mo. 189; Henderson v. Koenig, 168 Mo. 372; Township of Lodi v. State, 51 N. J. L. 402; State ex rel. v. Miller, 100 Mo. 439. (5) An invalid proviso attached to a general statute does not invalidate the whole statute, but only the proviso fails. State ex rel. v. Gordon, 236 Mo. 161.

BOND, J.—This is a *quo warranto* instituted by the circuit attorney of the city of St. Louis, to determine the right of respondent to the office of assessor for that city. By the charter of St. Louis, adopted in 1876, the office of assessor in that city was created and provision was made for filling the same by election thereafter held

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at intervals of four years. In accordance with this provision of the charter, respondent was elected and installed as such assessor in April, 1913. His term expired in the spring of 1917. Pending the expiration of respondent's term, the city of St. Louis adopted a new charter, providing, among other things, that the office of assessor should after the expiration of the term of respondent become appointive, with authority in the mayor of the city to make proper appointment thereto. Pursuant to the provision the mayor appointed an assessor, who qualified and demanded the office of respondent whose term had then expired. Respondent, however, obtained an appointment from the Governor on April 16, 1917, and claiming thereunder, refused to surrender the office, insisting that the Governor had the legal authority to appoint him upon the expiration of his term by virtue of the provisions of Section 11341 of the Revised Statutes of 1909, which respondent claimed made it necessary to elect an assessor quadrennially in the fall, instead of in the spring; that his own election and that of all previous assessors who had been elected in the city of St. Louis since the adoption of its charter in 1876 were invalid.

I. Since the adoption of the Constitution in 1875, the city of St. Louis, by virtue of the provision of that instrument, has become a city distinct from the four classes of cities into which all the other cities of the State are divided by the Constitution. It has become, also, the possessor of a distinct charter, the creation and adoption of which was provided for by article 9, sections 20, 22, 23 and 25, of the Constitution of 1875. That instrument further provided, upon the adoption of such charter and the accompanying scheme of separation from the county of St. Louis, that the provisions of the new charter should supersede and take the place of all special laws previously applicable in the former territory of St. Louis County then added to that city by the act of separation, and the previous charters and amendments thereto of the city of St. Louis. [Ibid., sec. 20.] It further provided that the charter of St. Louis to be adopted in virtue of its authority, should only be *amended* in the manner

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pointed out in that instrument. [Ibid., sec. 22; Laws 1901, p. 263; Laws 1905, p. 320; St. Louis v. Dorr, 145 Mo. l. c. 477, and cases cited.]

Recognizing, however, that the territory of the municipality thus authorized—although separated from the county of St. Louis—would continue under the control of the future Legislatures of the State of Missouri in all respects not otherwise provided by the Constitution, an express affirmation of such legislative authority was inserted in the provisions of the Constitution. [Ibid., sec. 25.] The city of St. Louis is the only one in the State which by name is authorized by the Constitution to exercise the specific powers granted to it by that instrument. [Ibid., sec. 20.] A general enabling act was, however, inserted to embrace other cities which, although not named, should fall within a constitutional class. [Ibid., sec. 16.] Cities thus constitutionally chartered form classes distinct and separate from the four divisions prescribed by the organic law (Ibid., sec. 7), and their respective charters have all the efficacy of special grants by the Legislature. [State ex rel. v. Mason, 153 Mo. l. c. 52; Kansas City v. Stegmiller, 151 Mo. 189; State ex rel. v. Mason, 155 Mo. 486, affirmed in State ex rel. v. Roach, 258 Mo. l. c. 565.]

The new municipality thus organized adopted by the vote of the people, a charter which provided a complete plan for the government of the city in all of its departments and for the election of officers necessary to put such plan into practical operation.

No department of the city government was more essential to its sustenance and vigor than that providing a basis for the collection of its revenues. The officer charged with performance of these duties is the assessor of taxes, nine-tenths of which belong to the city of St. Louis exclusively and without which it could not exist. Incidentally and as a part of his duties, his assessment includes a comparatively insignificant revenue for the State at large. Previous to the adoption of the charter, his election was provided for by laws specially applicable to the county of St. Louis. [Laws 1871-2, p. 88, sec. 21.] Upon the adoption of the new charter, that law was sub-

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stituted by the following provisions: Scheme and Charter, art. 5, sec. 15; Scheme and Charter, art. 4, sec. 1; Scheme and Charter, art. 1, sec. 8.

The new officer substituted by the charter for the performance of the duties of the assessor of St. Louis County, was designated as "The President of the Board of Assessors." His office was declared by the scheme and charter to be a "city office" and under the control of the city government, and he was required to perform all his duties "in accordance with the general laws" and his qualifications and duties were specifically prescribed. [Scheme and Charter, art. 5, secs. 17, 18, et seq.] The date of the elections of the President of the Board of Assessors and other elective officers designated in the scheme and charter, was fixed by that instrument to begin on the first Tuesday in April, 1877, and every four years thereafter. [Scheme and Charter, art. 2, sec. 1.] Under the express language of the Constitution, the charter requirements in these respects superseded and took the place of the previous special laws on the subject, applicable to the county of St. Louis. [Constitution 1875, art. 9, sec. 20.] In an accordant spirit, the Legislature of the State has never undertaken in any act, to alter or control the election of the President of the Board of Assessors (the successor by charter to the previous assessor of St. Louis County), but in every intervening act has expressly stated that such act providing for the election of an assessor in other counties of the State, should *not* include the city of St. Louis. [R. S. 1879, sec. 6678; R. S. 1889, sec. 7524; R. S. 1899, sec. 9137; R. S. 1909, sec. 11341.] And in the last of such enactments (the one under review in this case) has explicitly excepted the city of St. Louis. It is under this enactment that respondent claims, after having served four years by election, according to the charter, in the spring of 1913, that he is now entitled, after the expiration of his term, to hold over as appointee of the Governor, because his own and all prior elections for forty years were invalid in that they were held in the fall instead of the spring as was provided by the charter in fixing the date and the

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beginning of the terms of all the officers for the government of the city of St. Louis.

The sole basis of his contention (the burden of establishing which in a proceeding like the present is cast upon him) is the following statute:

“Election of assessor. At the general election in the year one thousand nine hundred, and every four years thereafter, there shall be elected by the qualified voters of the several counties in this State a county assessor, who shall hold his office for a term of four years, and until his successor is elected and qualified, unless sooner removed from office; and no person elected to said office of assessor shall hold said office more than two successive terms: Provided, that this section shall not apply to the city of St. Louis.” [R. S. 1909, sec. 11341.]

As to this statute, the contention of respondent is, that the proviso thereto is unconstitutional and void; and if the proviso be held unconstitutional, then the remainder of the statute would be at once extended and become an operative law which would embrace the territory of the city of St. Louis (excluded by the proviso), as well as every other portion of the State. Or, to put the matter in another form, the position of respondent is: first, that the proviso of the above statute is unconstitutional; second, upon that assumption, he then contends that the portion of the act above the restrictive terms of the proviso at once operated to include the territory of the city of St. Louis which was excluded by the proviso; whereupon the act, with its specific and express purpose thus defeated, became, by the stretching of its terms, a law fixing the date of the election of assessor of the city of St. Louis the same as that for the general election of state officers, instead of the date provided in the scheme and charter.

If there is any valid ground for the contention that the proviso of the above act is unconstitutional (not now necessary to be ruled) it would still be impossible, either in reason or upon authority, to sustain the second position affirmed by respondent, i. e. that the annulment of the proviso would *enlarge* the territory subject to the

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act. As this latter contention is decisive of the matter presented, it will be discussed first.

What would be the effect in law of a holding that the proviso above stated is unconstitutional? Plainly the only effect of such a decision would be to abolish the operative force and validity of the proviso. Such a holding would not and could not detract from the meaning of the terms of the proviso considered as a clear and express statement of the purpose and object of the Legislature in enacting the law of which it is a part. The legal validity of the proviso is one thing; its meaning as a definition of the intention and object of the legislative body is another and wholly distinct matter. As an avowal and expression, clear and conclusive of the intent and aim of the Legislature in framing the act, it would still exist, even if it were held to have no constitutional vigor as a law.

In the instant statute, by the terms of the proviso, the Legislature, in unequivocal language, declared that the act to which it was attached, should *not* embrace the city of St. Louis. The effect of this express declaration is identically the same as if the Legislature, instead of enacting the law as it now stands, had put it in the form of an act whose operation should extend over all of the one hundred and fourteen counties of the State mentioning them by name, and making no reference or allusion to its operation in the city of St. Louis, in which event that city would not have been the subject of the act. Neither could it be more so if, as was done, it was expressly excepted therefrom. Whatever might be thought of the validity of an enactment in that form, no one would have the temerity to claim that it evinced or was consistent with a purpose on the part of the law-making body to extend its operation over the territory of the city of St. Louis, and no court could so decide. But it is only upon the successful maintenance of such a theory that respondent can claim any right or title to the office of assessor in the city of St. Louis.

The rules relating to the severance of portions of an act of the Legislature as invalid, and the upholding

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of the remainder, have been repeatedly announced in this and other jurisdictions. In general this may be done only when the part of the law separated as invalid, is wholly independent of a remainder constituting a *complete* act of legislation in and by itself, in accordance with the intention of the law-making body at the time of its passage; for if it should appear from the terms of the act as a whole that the two portions were interdependent, or that the Legislature never intended to pass the one without the other, then the rule is unvarying that the act must stand or fall as a totality. This general rule applies only to the saving of a complete legislative enactment. It has no application when a portion of any act sought to be upheld is incomplete or imperfect; for the omission of the Legislature to exert its exclusive faculty to make a law, cannot be supplied except by a succeeding Legislature. Hence if it appears from the face and terms of the act (a portion of which is sought to be elided as unconstitutional) that the remainder was not designed in itself to be a complete act of legislation, either as to *subject* or *territory*, then it is self-evident the court could not supply the failure to legislate and such act would have to be upheld in its entirety or not at all. It is not logically possible to take any other view of this question.

Now in the matter in hand the Legislature, as appears from the act under review, in the simplest terms stated that the territory of the city of St. Louis should not be governed by it. Hence as to so much of the State of Missouri as is contained in the boundaries of that city, there was a total failure on the part of the Legislature to make any law whatever. The present case cannot, therefore, fall within any rule of construction applicable to the separation of a complete act from an invalid portion of the same act; for here the Legislature has refused to make a law extending over the city of St. Louis. Consequently no court can now make a law which the Legislature adjourned without enacting, or, in other words, make a law as to that territory over

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which the lawmaking body failed and refused to exercise its power of legislation.

It must not be overlooked in the instant case, that the question to be solved is not whether the Legislature had the power to act, but whether it did, *in fact*, legislate as to the territory of St. Louis when the statute under review was passed. The terms of that statute declare to a certainty that such portions of the State's domain was *not* embraced within the scope of the act. The question as to whether or not it should be included, was directly presented to the Legislature yet the fact is indisputable that the lawmaking body, after consideration of that question, expressly refused to make a law governing it and so stated in the act itself. In view of its express refusal to legislate as to this locality, what the Legislature might have done is a wholly futile inquiry devoid of any logical or legal consequence. The fact that it did not make a law for the city of St. Louis, but positively declined to include that territory, is apparent and undeniable from an inspection of the language and terms of the act under review. Having stamped that decision in the very act itself, it is impossible, except by perversion of its terms and ascribing to its words a meaning which is contrary to their intrinsic sense and import, to hold that the Legislature included or intended to include the city of St. Louis as the subject of the act. It follows that the entire theory of respondent, that the statute under review, upon a holding of the invalidity of the proviso would, *without further legislative action*, become a different law including the excluded territory, is built upon a tissue of sophisms and fallacies and contradiction of terms relied upon to prove that legislative nonaction meant affirmative action; and exclusion meant inclusion.

The settled rule of law sustaining the conclusion that the act under review is inoperative as to the territory of the city of St. Louis, whether its proviso should be held valid or invalid, is clear and controlling, as appears from the text-books and decisions, and rests upon the results of correct reasoning when applied to statutes

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of the character of the one under review. The principle is thus stated by a standard writer:

"If, by striking out a void exception, proviso, or other restrictive clause, the remainder, by reason of its generality, will have a broader scope as to *subject* or *territory*, its operation is not in accord with the legislative intent and the whole would be affected and made void by the invalidity of such part." [1 Lewis's-Sutherland's Stat. Const. (2 Ed.), sec. 306, p. 597.]

Again: "One important class of cases in which the severability of valid and invalid portions of an act and the determination of the legislative intent are involved, consists of statutes containing invalid exceptions or provisos; the general rule is, that if such proviso operates to limit the scope of the act in such manner that by striking out the proviso the remainder of the statute would have an undue scope either as to the *subject* or *territory* then the whole act is invalid, because such extended operation would not be in accordance with the legislative intent." [6 R. C. L. p. 129, sec. 127, Title: Constitutional Law.] (Italics ours.)

The Supreme Court of the United States in considering a case where the first section of an act embraced all persons, while the ninth section declared the statute should not apply to agriculturists or live stock dealers, said:

"If the latter section be eliminated as unconstitutional, then the act if it stands will apply to agriculturists and live stock dealers. Those classes would in that way be reached and fined, when, evidently the Legislature intended that they should not be regarded as offending against the law, even if they did combine their capital, skill or acts in respect of their products or stock in hand. Looking then at all the sections together, we must hold that the Legislature would not have entered upon or continued the policy indicated by the statute unless agriculturists and live stock dealers were excluded from its operation and thereby protected from prosecution. The result is that the statute must be regarded as an entirety and in that view it must be adjudged to be unconstitutional" on the ground that the exception as to agriculturists

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and live stock dealers was unconstitutional. [Connolly v. Union Sewer Pipe Co., 184 U. S. l. c. 565.]

In quoting and adopting the foregoing rule the Supreme Court of Montana said:

"This is a recognition of the soundness of the proposition that the courts may not by process of interpolation or elimination, make statutory provisions apply and extend to subjects not falling clearly within their terms; for by so doing they would, to this extent, usurp the functions of the lawmaking department of the government." [State v. Cudahy Packing Co., 33 Mont. l. c. 187.]

The matter came again before the Supreme Court of the United States in reviewing a section of the code of Georgia which, in referring to the employment of pilots, excepted from the operation of the act the territory between the ports of that State and South Carolina. Upon the contention that this section might be disregarded, leaving the residue of the act valid, the Supreme Court of the United States said:

"But the insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the Legislature of Georgia, the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation *beyond* the legislative intent and *beyond* what any one can say it would have enacted in view of the illegality of the exceptions. We are therefore constrained to hold that the provisions of section 1512 of the Code of Georgia cannot be separated so as to reject the *unconstitutional exceptions* merely and that the whole section must be treated as annulled and abrogated." [Sprague v. Thompson, 118 U. S. l. c. 94, 95.]

The Supreme Court of Wisconsin having under review an act providing for the erection of county bridges, which contained a proviso "this act shall not apply to the county of Grant," in answer to the contention that the proviso might be disregarded as unconstitutional, leaving an otherwise valid act, said: "In the present case there is no room for the application of this rule, for the reason that the Legislature has not enacted that the statute

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should extend to Grant County, but has expressed a contrary intention. By no possible construction can the statute be held to be operative in Grant County." It was therefore held that the entire statute was invalid. [State ex rel. v. Sauk County, 62 Wis. 376.]

This decision was quoted and adopted by the Supreme Court of North Dakota, in Edmonds v. Herbrandson, 2 N. D. l. c. 281. It is a ruling on the exact question presented in this case, which is whether an act of the Legislature excepting the territory of the City of St. Louis can be held valid if such an exception is unconstitutional. It is in precise conformity to the rule above quoted from the text-writers and declared by the Supreme Court of the United States and affixes to the act under review the legal conclusion arising from an interpretation of its language.

It is wholly unnecessary to pass upon the contention of respondent that the proviso of the act under review is unconstitutional; for having shown that if so, nothing is left of the act itself as an entirety, since we could not make it apply to the city of St. Louis without judicial legislation, it follows upon that conclusion that respondent would have no greater authority to hold the office in question than if the act was constitutional and valid in all respects. In neither case would the election of an assessor for the city of St. Louis be governed by the terms of the act, for if valid as an entirety, St. Louis is excepted from its provisions, and if invalid as to the proviso only, then the legislation in the body of the said act did not extend to the "*subject or territory*" of the city of St. Louis and cannot be so enlarged by any process of reasoning or construction in the light of the law as expounded above.

II. From what has been said there is no escape from the conclusion that respondent is not entitled to the office, his right to which is questioned by the *quo warranto* filed in this case, and that he should be ousted from further tenure thereof.

The cases cited by respondent in support of his claim of the unconstitutionality of the proviso can have no relevancy to the solution of what would be the

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extent of the act if that were eliminated. However, it is not out of place to say that in the case of State ex rel. v. Koeln, 270 Mo. 174, the exact opposite of the question before us was presented. In that case an act was under review which *in terms* was *generally* applicable to all parts of the State. It was, therefore, held to be susceptible of a construction that the Legislature intended to include St. Louis (it being an integral part of the State of Missouri) when it passed that act. [R. S. 1909, sec. 11432.] After quoting this section and also the rule of statutory construction stated in Section 8057 of the Revision of 1909 (founded on the Act of the Legislature of 1879) to the effect that the use of the word "county" in "any law general in its character to the whole State, shall be construed to include the city of St. Louis unless such construction be inconsistent with the evident intent of the law or some law applicable to such city," it was held, in the absence of any showing of "evident intent" that the State-wide law applicable to the election of collectors of the revenue should *not* include the city of St. Louis, that the act then under review would embrace that territory. In announcing that conclusion the learned writer of the opinion said:

"Whether the General Assembly had exercised its power to legislate upon this subject prior to 1905, we need not here stop to consider. We have no hesitancy in saying that by the Act of 1905, *supra*, it *did* exercise such power."

It is apparent at the merest glance that the point decided in that case has no bearing whatever upon the interpretation of the act under review in the present proceeding. In the Koeln case, by its unrestricted terms the act under review was held to include the State at large. In the present case the act, by its terms, is confined to the portion of the State lying outside the city of St. Louis, thereby demonstrating the fact and intention of the Legislature as to the limitation of the law. In so acting and stating its purpose, the Legislature complied with the rule prescribed by that body in 1879 (immediately following the separation of the city and

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county) for the construction of future enactments relative to the territory of the city of St. Louis. [R. S. 1909, sec. 8057, par. 19.] In said opinion it is also remarked *arguendo*, in reference to the special laws which the charter of the city of St. Louis substituted for those previously applicable to the county of St. Louis: "This undoubtedly was a very wise provision making for harmony rather than chaos and confusion upon the occurrence of the act of separation then in contemplation." It was then held that it was thereafter competent for the Legislature to change such substituted special laws in a legal way, and that it "*did*" so by the *general terms* of the Act of 1905. It is apparent that ruling is wholly foreign to the question presented by the terms of the act before us.

The case of State ex rel. v. Roach, 258 Mo. l. c. 565, involved no question of the *failure* of the Legislature to enact a law covering the territory of the city of St. Louis, as is the question presented here; but dealt exclusively with the provisions of the act of the Legislature of 1913 (Laws 1913, p. 334), purporting to establish a non-partisan judiciary in *all counties and cities of the State*, based upon a classification by population. It is evident that the question then presented has not the most remote analogy to the present case, which turns on the fact of non-legislation as to a particular locality by virtue of its express exclusion from the terms of the act. As has been said, the crux of this case is not the power of the Legislature by a valid enactment to pass laws which shall include all the territory of the State, but whether in the particular act under review it, in fact, did so.

Neither is there anything in common between this case and the decision by a divided court (State ex rel. v. Gordon, 236 Mo. 142), for the point in judgment there was whether the Legislature, after the passage of a general law making a full appropriation for all the uses of the game warden's office, could by subsequent proviso prevent the use of these funds by a particular individual. In the present proceeding the Legislature has

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not, by a *general* law, embraced the territory of the city of St. Louis, but has excinded that portion of the State from the operation of its act, as to which it has been shown that whether this limitation was valid or invalid, the lack of affirmative legislation could not be supplied by the courts.

Being unable to see, under our form of government, any method by which such *affirmative legislation* can be had except through the lawmaking body, it must follow that the respondent is not entitled to the office predicated upon a contrary assumption and that the writ of ouster should be granted.

Walker and *Woodson*, *J.J.*, concur; *Faris*, *J.*, concurs in separate opinion; *Williams*, *J.*, dissents in separate opinion, in which *Graves*, *C. J.*, and *Blair*, *J.*, join.

FARIS, J. (concurring)—I have had much difficulty with this case. It is a close and vexing one, wherein the controlling and vital questions up for solution are colored and affected by a multitude of converging, but conflicting, rules of law, whereof a selection involving the utmost nicety of discussion must be made. Against my own predilections, held at the argument of the case, I have been constrained to concur with *Bond*, *J.*, but I shall take the liberty, even at the risk of repetition, of setting out my reasons for this concurrence.

When the Constitution of 1875 went into effect, there existed in the body of the general statutes of this State, which provided for the election of assessors, a special exception excluding the county of St. Louis from the provisions thereof; which statute, with the exception mentioned, read thus:

“There shall be elected by the qualified electors of the several counties in this State, except the county of St. Louis, at every general election for members of the General Assembly, a county assessor, and every such election shall be conducted, in all things, according to the laws regulating the election of other county officers.” [Sec. 21, p. 88, Laws of 1872.]

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It is clearly and I think accurately conceded by the learned counsel for both parties to this controversy: (a) that this exception was entirely valid under the constitutional provisions in force when it was passed; (b) that the special statute to which this exception referred was rendered inoperative and superseded in the city of St. Louis, by the charter provisions of that city, upon the subject of the selection of an assessor; (c) that such supersession by the charter was expressly authorized by the Constitution itself (Constitution 1875, sec. 20, art. 9); (d) but that the Legislature has the authority to pass a general statute upon this subject, which may include the city of St. Louis, and in its turn supersede such charter provisions; and (e) therefore the charter provisions are still in force and govern this case, and this writ should be made peremptory, *unless* the Legislature has passed a constitutionally valid statute upon the subject, which had the effect to repeal and supersede the charter. Relator contends there has been no legislative intent to pass such a statute and that no such statute has been enacted; respondent contends that such a statute has been passed, but that it is unconstitutional. Within this narrow compass then lies the whole of the contentions confronting us.

Passing over the mere verbal change, made in 1879 (whereby the word "county" was stricken out and the word "city" put in lieu thereof, Sec. 6678, R. S. 1879, as well as the passage in 1895 of a new act repealing inconsistent provisions, Laws 1895, p. 41, whereby the term of office of all assessors in the State, *except in the city of St. Louis*, was made four years instead of two years, and the incumbents of that office thereafter rendered ineligible to hold any county office whatever for a period of two years after the expiration of their terms as assessor), we come to the Act of 1899 (Laws 1899, p. 324; Sec. 11341, R. S. 1909), which was in force when this controversy arose. We do this because, however true it is that much of the argument necessary to be made might apply with equal force to the Act of 1895, *supra*, the fact of the

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passage thereafter of the existing law renders a discussion of prior laws wholly academic. Whether the provisions of the charter of the city of St. Louis have or have not been repealed, or whether the Act of 1899, which it is urged repealed them, was afflicted with constitutional defects, are the questions vexing us, and these difficulties exist, if they exist at all, in equal degree in the subsisting law. For this reason we may sweep aside the consideration of any amendment, or change in this law, except those affecting the existing statute (Sec. 11341, R. S. 1909) upon the subject.

The Act of 1899, after especially repealing all existing laws governing the election of assessors in this State, in a separate section provided thus:

"At the general election in the year one thousand nine hundred, and every four years thereafter, there shall be elected by the qualified voters of the several counties in this State a county assessor, who shall hold his office for a term of four years, and until his successor is elected and qualified, unless sooner removed from office; and no person elected to said office of assessor shall hold said office more than two successive terms: Provided, that this act shall not apply to the city of St. Louis." [Laws 1899, p. 324, sec. 1; Sec. 11341, R. S. 1909.]

As stated above, learned counsel for the relator frankly concede that pursuant to the delimitations of the charter-making power conferred on the city of St. Louis by the Constitution (Constitution 1875, secs. 20 and 22, art. 9; Laws 1905, p. 320), and of the retention in the Legislature of the same authority of control over such city as by the organic law the Legislature has over the several counties (Constitution 1875, sec. 25, art. 9.), it has the right to pass a general law governing the manner and time of the election of assessors in this State, which general law when enacted will apply to the city of St. Louis, and supersede that city's present charter provision upon this subject.

So far the case, the history of the legislation, and the argument follow in every substantial behalf the late

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case of the State ex rel. v. Koeln, 270 Mo. 174, and up to this point what is said in that case applies in every material principle and aspect to the instant one. But in the Koeln case the conclusion that the Legislature had acted was deducible from the fact that it had theretofore enacted a law providing for the election of collectors "in all the counties of this State" (Laws 1905, sec. 1, p. 272), without having in terms excepted the city of St. Louis from the provisions thereof. Here in the instant case the Legislature in 1899, as stated above, repealed the statute governing the election of assessors in all of the 114 counties of the State, and enacted a new statute in lieu thereof, which statute does not apply in terms to the city of St. Louis, but on the contrary that city is specifically excepted from its provisions. So relator contends that the retention for more than forty-five years continuously of the clause which excepted the city of St. Louis from the provisions of the general law, conclusively shows that the Legislature has not superseded the charter; but on the contrary the Legislature by this fact has shown a fixed determination not to legislate for the city of St. Louis in the premises, and it follows that the charter provisions are still in force and govern this matter wholly.

From the facts (1) that when the present State Constitution was adopted, the matter of electing an assessor for St. Louis County was governed by a special law, (2) that the Constitution expressly provided that the charter of the city of St. Louis, when made and adopted should supersede and be in lieu of "all special laws relating to St. Louis County inconsistent with such scheme" (Constitution 1875, sec. 20, art. 9), but (3) reserved the right in the Legislature of similar control over said city to that which the Legislature had over other counties in the State, WILLIAMS, J., reached the conclusion (in which a majority of this court concurred) that all special laws which were not inconsistent with the charter of the city of St. Louis, and which were in force when our Constitution was adopted, continue in force in that city until the Legislature has exercised its power of control therein by passing a statute to control the matter under inquiry. [State ex rel. v. Koeln, 270 Mo. 174.] If this is the law,

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and it seems both logical and convenient, and we have approved it, then it seems to the writer that the entire difficulty vanishes. Upon this view we are not required to rule whether the proviso in the Act of 1899, now Section 11341, Revised Statute 1909, be constitutional or not. The case becomes one of the simplest sort of statutory construction. The exception of the city of St. Louis from the operation of the general law governing the election of the assessors has been, as we have seen, on the statute books since a time long prior to the adoption of our Constitution. Not only has the Legislature not acted in the premises, and not legislated upon this subject, but it has shown a fixed and steadfast purpose not to act, and not to legislate. By retaining this exception continuously for more than forty-five years the Legislature has said in effect that upon the matter of electing assessors it purposed to pass laws to govern the remainder of the State, but that it does not purpose to change the law governing this matter in the city of St. Louis from the condition wherein the Constitution left it. This fixed purpose could not have been shown in any other way except by the proviso, or by some other similar exception contained in the statute. This is so, because of the provisions of section 8057, Revised Statutes 1909, which would, absent an exception, automatically have the effect to make the statute applicable to the city of St. Louis, as one of the "counties" of the State. [State ex rel. v. Koeln, *supra*.] Therefore the Legislature has uniformly incorporated an exception in the general statute, which makes plainly apparent its purpose not to legislate on the subject, so far as the city of St. Louis is concerned, which exception in the language of Section 8057, *supra*, renders any construction of an opposite purpose "inconsistent with the evident intent of such law."

Section 11341, *supra*, expresses therefore the legislative purpose of changing the law as to all that part of the State outside of the city of St. Louis, and likewise expresses a fixed intent not to change the law in such city. It is as clear as it is possible for any legal proposition to be that, if the proviso be taken away from the above section, because it is violative of the Constitution, then the whole

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section fails. Any other construction would violate settled rules of statutory construction in at least two vital particulars. For, as pointed out by Judge BOND, the excision of the proviso *widens the scope and enlarges the territory within which the law shall operate*, which is forbidden (State ex rel. v. Railroad, 246 Mo. 512), and it is also right in the face of that rule of statutory construction which forbids the excision of a part of a statute as unconstitutional *when such excision serves to change the legislative intent*. [State ex inf. v. Duncan, 265 Mo. 26; Nalley v. Home Ins. Co., 250 Mo. 452; State ex rel. v. Wright, 251 Mo. 325; Greene County v. Lydy, 263 Mo. 77.] In my humble view, to hold that the proviso is invalid and the remainder of the section valid would be violative both of settled rules of statutory construction, and of common sense. For in the one case it would be tantamount to holding that in construing a statute we are no longer to be controlled by any consideration of the scope and territory intended to be embraced therein, or by the manifest intent of the law-making body; and in the other to holding that the city of St. Louis is included within the intendment of the general provisions of the statute in the very face of the unequivocal statement to the contrary contained in the proviso itself. If the excision of the proviso for that it is bad, serves to render the whole section invalid—and I am not able to see how there can be two differing views on this point—then it follows that there has been neither a valid election held to fill the office of assessor, nor a single *de jure* incumbent in that office in this State since the Act of 1895 went into effect.

The relegation to the charter of matters relating to the assessor of the city of St. Louis had all of the force and effect of a solemn statute. This is so, because the Constitution provided that all special laws applying to St. Louis County should *ipso facto* stand repealed upon the adoption of a charter, should the provisions thereof be inconsistent with such special laws. [Constitution 1875, sec. 20, art. 9, supra.] This had the effect to make the charter provisions the superior and controlling rule in all matters theretofore governed by a special law, as were then matters relating to the office of assessor in St.

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Louis County. [Laws 1854-5, p. 178; Secs. 2-8, p. 1326, R. S. 1855.] This special law, or to be exact, the charter provision which superseded it, is yet the law in the city of St. Louis, unless it has been repealed expressly, or by clear implication by some other statute. Counsel have not pointed out to us, nor have I been able to find any such repealing statute.

The numerous (and largely pestiferous) broods of special or local laws which were passed before the present Constitution was adopted, were not necessarily abrogated by that instrument. As a matter of fact but few of them were so nullified, and these few by virtue of the provisions of Section 1 of the Schedule to the Constitution, for that they were inconsistent with the provisions of that instrument. [State to use of Ramming v. Lumber Co., 170 Mo. 7.] By far the great majority of such laws continued in force by express permission of Section 1 of the Schedule, supra, till they were repealed expressly or by the clearest implication, and many of these special laws are still in full force and vigor. Barring the effect upon such laws of Section 11 of the Schedule, the Constitution operated upon them prospectively only. It forbids the passage in divers matters and cases of any more special laws (Sec. 53, art. 4, Constitution), but it exercised no more potency in the repeal of an existing special law than it did in the repeal of a general law. Both continued in full force and effect, till they were repealed, unless they were in conflict with the Constitution.

Nor, as it has long been held, will the passage of a general law *ipso facto* and necessarily repeal a local or special law. In order to have the effect of repealing such special law the two acts must be in irreconcilable conflict, or the legislative intent to prescribe one single authoritative rule which shall govern must clearly appear. [City of St. Louis v. Alexander, 23 Mo. 483; Peters v. Renick, 37 Mo. 598; State ex rel. Vastine v. Judge of Probate Court, 38 Mo. 529; State ex rel. v. Macon County, 41 Mo. 453; St. Louis v. Insurance Co., 47 Mo. 147; State ex rel. v. Severance, 55 Mo. 378; Manker v. Faulhaber, 94 Mo. 430; State ex rel. v. Frazier, 98 Mo. 426; St. Joseph & Iowa Ry. v. Cudmore, 103 Mo. l. c. 638; St. Jo-

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seph & Iowa Ry. v. Shambaugh, 106 Mo. l. c. 570; State v. Bennett, 102 Mo. 356; State ex rel. v. Slover, 134 Mo. 10; State ex rel. v. School Board, 131 Mo. 505; Folk v. St. Louis, 250 Mo. 116.]

How can it be said that the repeal of a general statute carrying in the body thereof a special reference statute, which in terms excepts the city of St. Louis from the provisions of the general law and refers to the special law which shall govern St. Louis, had the effect to repeal the exception, when in lieu of such general law a new act is passed, which itself contains the identical exception? I am thoroughly convinced that no affirmative action meet for the repeal of the provisions of the charter of the city of St. Louis has yet been taken by the Legislature, and therefore that the manner and time of electing an assessor for the city of St. Louis are still referable to the provisions of that charter. For these reasons I concur with BOND, J., in holding that the writ of ouster should be awarded herein.

WALKER, J. (concurring)—I concur in the opinions of my associates, Judges BOND and FARIS, in holding that Section 11341, Revised Statutes 1909, is a valid statute and that the violation of same in the appointment of an assessor in the city of St. Louis by the Governor was unauthorized. The arguments employed by my associates in reaching this conclusion require no gloss. My purpose, therefore, in this concurrence is not to elaborate these arguments but, from an analysis of the statutes concerning the assessment of taxes in the city of St. Louis, to demonstrate the practical result that would follow an elimination by judicial construction of the proviso excepting the office of assessor in said city from the provisions of said section 11341. Respondent contends that such an elimination would leave a general law applicable alike to all portions of the State. The futility of this contention, under a right application of the rules of constitutional and statutory construction, has been clearly shown by my associates. Let us, however, for the nonce waive the question as to the validity of the section after the excision therefrom of the proviso. There would re-

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main, so far as pertains to the question here under consideration, a general law requiring the election of an assessor in the city of St. Louis. Something more is necessary, however, than the mere creation of an officer or an office to render the act of creation otherwise than barren of results. In addition, power must be declared and duties defined to render such an act more than an empty declaration or a sound signifying nothing in the practical conduct of affairs. In this case it must appear that the general statutes now in force, of an administrative nature, relating to the duties of assessors in other parts of the State may be effectively applied in harmony with the purposes of their enactment in the discharge of the duties of an assessor elected in the city of St. Louis.

It will not be contended even by those unfamiliar with the body of the law regulating the assessment of property, because no rule of construction lends countenance to such a contention, that the elimination of the proviso from Section 11341 by declaring same invalid, will perforce eliminate identical provisions in other sections of the statute which prescribe the duties of assessors. Only by implication can such statutes be in any wise affected by a ruling in regard to Section 11341. Implications in regard to the validity of statutes are not favored. They are rarely made, and the intent and purpose of the Legislature in the enactment of these statutes lend no color to the conclusion that they should be declared invalid on account of the contended partial invalidity of Section 11341. In addition, the general rule is applicable here as elsewhere that until statutes are judicially declared invalid every presumption will obtain in favor of their validity. While conceding, therefore, simply for the sake of this argument and not that such a result could follow, that a general law will remain after the elimination of the proviso from Section 11341, as contended for by respondent, the other sections supplementary thereto and administrative in their nature must, according to their express terms, be given a reasonable interpretation, adding nothing thereto nor taking anything therefrom that will extend or limit their meaning.

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Thus interpreted an analysis of these sections will enable it to be determined whether they can be applied in prescribing the duties of an assessor in the city of St. Louis.

At the threshold of this investigation we are confronted in each of these sections with the same exception which respondent contends should be eliminated from section 11341. Despite the presence of these exceptions, that the utmost latitude of construction, even to the invoking of an implication, may be employed to render these sections if possible in harmony with and in aid of Section 11341, let the implication be made although no rule of construction authorizes same, that the ruling contended for by respondent in regard to Section 11341 may be extended to these sections. This having been done, let it be determined from the sections themselves whether they can be made operative in defining the duties of an assessor in the city of St. Louis. Under Section 11346 each assessor is required to enter into a bond to the State to the satisfaction of the court or clerk in vacation, the amount of same within the limitation therein prescribed, to be fixed by the court or clerk for the faithful performance of the duties of his office. While not so stated, it is evident on account of the duties required to be performed by a county court that it was this tribunal referred to when the word "court" is employed in this section. Persuasive force is added to this conclusion in the provision at the close of said section that the "bond shall be deposited in the office of the clerk of the county court." There being no county court or county clerk in the city of St. Louis, this section cannot be construed as requiring a bond from an assessor in said city; and if it be held that he must be elected under the general law, there will remain no statute requiring him to enter into such an obligation as is required of assessors elsewhere.

Section 11361 requires the clerk of the county court to deliver to the assessor within the time therein stated, and every two years thereafter, an assessor's book of the last assessment of real estate and a list of taxable lands to be furnished, as elsewhere required by the register of lands, which the assessor, after the completion of his as-

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essment, shall return to the clerk. Section 11362 prescribes a penalty to be enforced by the county court for the assessor's failure to comply with the preceding section. Section 11363 requires county courts to procure from the register of lands a plat showing, according to their legal subdivisions, the taxable lands in their respective counties. The purpose of this section is that the lists thus procured may by the county court be furnished to the assessors to prepare their land assessment books as required by Section 11361. The operative force of these sections is dependent upon the existence of a county court. The non-existence of such a tribunal in the city of St. Louis, therefore, renders these sections inapplicable in prescribing the duties of the assessor in said city if elected under the general law.

Section 11364 requires the county board of equalization in each county in each year to examine and compare the list of lands assessed, with plats to be procured from the U. S. Land Office. Under Section 11402 the members of the county court, county clerk, the county surveyor and the county assessor constitute the board of equalization, hence Section 11364 and other sections relative to the furnishing and filing of plats and lists of lands for assessment cannot be rendered applicable to the performance of this function in the city of St. Louis, as the officers constituting the county board of equalization do not exist in said city. Section 11372 prescribing the arrangement of assessor's land lists cannot, on account of the real property in said city not being subdivided according to Government subdivisions, be applied to the arrangement of assessor's books therein. Section 11373 requires that the President of the Board of Assessors in the city of St. Louis and county assessors elsewhere as directed by their respective county courts, shall prepare plat books showing changes in the assessments of real property for not longer than three years. If an assessor is elected under the general law for the city of St. Louis, neither by direct appointment nor by *ex officio* creation can there be a President of the Board of Assessors in said city—this, because such president owes

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his existence, *ex officio* in its nature, to a precedent appointment under the city charter of an assessor by the mayor. The President of the Board of Assessors being non-existent and no express duty so far as this section (11373) is concerned, devolving on the assessor elected under the general law, and the duty required of assessors elsewhere being dependent upon an order of the county court and there being, as we have shown, no county court in the city of St. Louis, this section will necessarily be wholly inoperative therein.

The course to be pursued to replace or restore assessors' books in the event of their destruction by fire or otherwise as prescribed in Section 11382 cannot be applied in the event of such a calamity occurring in the city of St. Louis. The terms of this section are expressly limited to counties having county courts, county boards of equalization and county clerks, and the power necessary to restoration is confined in express terms to these officers. If a ruling be made in conformity with respondent's contention, the assessor in the city of St. Louis would as a consequence be compensated, if at all, under the general law. This statute under the terms of the section (11308) providing for such compensation cannot be made applicable to an assessor in the city of St. Louis. Furthermore, the result which would follow an attempt to regulate the assessment of property in said city, under the general law, would preclude equalizing the values of property therein on account of the absence from the general statute of a provision for a board of equalization in the city of St. Louis, the statute (Art. 3, Ch. 117, R. S. 1909) providing only for county boards of equalization.

An assessor elected under the general law must look to such law for a definition of his duties and the extent of his powers. If not found therein, they do not exist. The sections of the law in regard to the assessment of property which have been analyzed show the utter inapplicability of the general law to the city of St. Louis and that it was the purpose of the Legislature to limit such law to counties whose administrative affairs are conducted by county courts, and to leave the super-

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vision and control of this very important governmental function in the city of St. Louis to its charter and ordinances. A ruling therefore which would authorize the election of an assessor for the city of St. Louis under the general law, would result in that official being deprived of any power to perform the functions necessary for the assessment of property therein. In other words, a general law is incapable of enforcement in the city of St. Louis because of the different conditions existing in said city and in other portions of the State. This being true, the exception to the constitutional provision (Sub. 32, sec. 53, art. 4) prohibiting special legislation may properly be invoked. The history of these statutes is strongly persuasive of the correctness of this conclusion. Section 11341 and the other sections cited have in their present words, except the change from the word county to that of city, been for more than sixty years upon our statute books. This cannot be reasonably construed as other than an evidence of legislative approval. If, therefore, the constitutional exceptions above cited were not sufficient to sustain the validity of this statute, the general rule which has frequently received our approval, should suffice to the effect that where the validity of a statute has for many years been recognized not only by the law-making power, but by the bench and bar and the people, the court should approach the question of its invalidity with great caution. Especially is this true where such a ruling as is contended for by respondent would necessitate the amendment of the entire body of the law in regard to the duties of the assessor and the assessment of property, and prior to such legislative action leave the city of St. Louis without power to assess property, thus depriving it of the most important step to the levy and collection of taxes, without which it could not exist. It may be asserted as a general rule that no statute, the objection of which is to promote a public purpose, for example the raising of revenue, should, if its validity can be sustained under any reasonable interpretation, be declared invalid. This is but a broader statement of the well defined rule that a law is always presumed to be valid and the greater its importance the stronger will be the presumption.

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In view of all of the foregoing, I am of the opinion the writ of ouster should go.

BOND, J. (concurring)—I fully concur in the opinion of our Brother WALKER, that the hypothesis that a valid law would grow out of a judicial maiming of the act under review by cutting off its proviso, would lead to a countless host of absurdities when other acts pertinent to the duties of an assessor are considered.

I also feel that the conclusion in the opinion written by me has been strengthened by the demonstration of his. I do not, however, concede, even for argument, that a dismembered act of the Legislature can become a valid law—*as to subjects or objects excluded in the original*—after the session of the Legislature is ended.

WILLIAMS, J. (dissenting)—I dissent for the reason that while I am of the opinion that the *proviso* in the Assessors' Act (Sec. 11341, R. S. 1909) is unconstitutional, yet I am of the further opinion that the remaining portion of the act supplies a valid statute complete within itself, and that the remaining portion is of such character as to justify the belief and presumption that the Legislature would have enacted it even though the *proviso* had been omitted or its invalidity been known. [State ex rel. v. Gordon, 236 Mo. 142, l. c. 170; State ex inf. v. Washburn, 167 Mo. 680; Cooley's Constitutional Limitations (7 Ed.), pp. 246-8; Hale v. McGettigan, 114 Cal. 112, l. c. 117-121.]

Graves, C. J., and Blair, J., concur herein.

THE STATE ex rel. JOHN C. LONG v. JAMES ELLISON et al., Judges of Kansas City Court of Appeals, and MARGUERITA CLARK.

In Banc, December 22, 1917.

1. APPELLATE JURISDICTION: Amount in Dispute: Not Considered by Court of Appeals: Decided on Certiorari. Although the Court of Appeals did not expressly rule that the amount in dispute did not exceed \$7,500, yet if it assumed jurisdiction, the Supreme

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Court will upon *certiorari*, without reference to harmony of opinions, quash its decision, if the amount in dispute exceeded \$7,500.

2. _____: _____: **Appeal from Order Granting New Trial.** It is the amount involved in the appellate court that fixes appellate jurisdiction, and not what may be involved in the trial court on a new trial. Where plaintiff sued for \$10,000 and recovered verdict for \$10,000, and filed a *remitititur* for \$2,500, and the plaintiff appealed from an order granting a new trial, the amount in dispute in the appellate court, from the standpoint of both plaintiff and defendant, was \$7,500, and the Court of Appeals had jurisdiction.
3. **CERTIORARI: Directed Judgment.** On *certiorari*, issued to a court of appeals on the ground that its opinion therein is contrary to previous rulings of the Supreme Court, the latter court, if it quashes the decision of the other, will not direct a judgment in the case, or tell it what to do when it undertakes to make a new record. The Supreme Court will only uphold or quash the judgment of the court of appeals, presuming that upon questions ruled that court will follow its rulings.
4. **INSTRUCTION: Omission of Necessary Element: Cured by Others.** An instruction purporting to cover the whole case and directing a verdict for plaintiff, from which is omitted an element of negligence necessary to plaintiff's right to recover, cannot be cured by one given for defendant; and a holding by the Court of Appeals that such omitted necessary element is supplied by other instructions given, contravenes certain previous rulings of the Supreme Court, and requires that its decision be quashed.

Held, by BLAIR, J., dissenting, that the Court of Appeals erred in holding that the instruction was erroneous or that it omitted any element necessary to plaintiff's right to recover, and that being true its opinion cannot be quashed for that it further erred in holding that the omission was supplied by other instructions given.

Certiorari.

RECORD QUASHED.

Rees Turpin and John B. Pew for relator.

(1) The respondent judges failed and refused to follow the last controlling decisions of this court. The conflict is between this decision and the decision of this court in *Wojtylak v. Kansas & Texas Coal Co.*, 188 Mo. 260. And said instruction is in obvious and irreconcilable

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conflict with the decision in Hall v. Coal Company, 260 Mo. 369. The St. Louis Court of Appeals has construed the foregoing decisions of this court by direct reference in the following cases and such construction is in direct, obvious and irreconcilable conflict with the opinion of said respondent judges in the cases at bar. Said cases are: Trayler v. White, 185 Mo. App. 325; Humphreys v. Railway, 191 Mo. App. 710; Walker v. White, 192 Mo. App. 13; Rissmiller v. Railway, 187 S. W. 573; Pearson v. Lafferty, 193 S. W. 40.

Hogsett & Boyle for respondents.

(1) This court may say that the decision of the Court of Appeals conflicts in certain particulars with previous rulings of this court and quash only that portion of the opinion, permitting the judgment to stand if it is for the right party. State ex rel. v. Reynolds, 194 S. W. 878. (2) This court may inquire into the correctness of the decision with which it is claimed the opinion of the Court of Appeals is in conflict, and overrule such decision and sustain the opinion of the Court of Appeals. State ex rel. v. Reynolds, 186 S. W. 1057. (3) This court has no jurisdiction to enter judgment in the case out of which the proceedings in *certiorari* arose, but will simply quash or sustain the opinion of the Court of Appeals as the circumstances warrant. State ex rel. v. Reynolds, 186 S. W. 1072; State ex rel. v. Ellison, 186 S. W. 1075. (4) The opinion of the respondent judges in holding that the omission in plaintiff's instruction for a verdict was cured by an instruction given at the instance of defendant is not in conflict with the decisions of this court. Shaw v. Kansas City, 196 S. W. 1099; Salmons v. Railway, 197 S. W. 37; Tawney v. United Railways, 262 Mo. 602; Tranbarger v. Railroad, 250 Mo. 59; Railroad Co. v. Kemper, 256 Mo. 279; Railway v. Stewart, 201 Mo. 499; Lange v. Railroad, 208 Mo. 477; Meily v. Railroad, 215 Mo. 587-8; Meadows v. Life Ins. Co., 129 Mo. 97; Hughes v. Railway, 127 Mo. 452-3; Owens v. Railway, 95 Mo. 181. The St. Louis Court of Appeals has announced this rule in: Bliesner v. Distilling Co., 17⁴ Mo. App. 150; Pendergrass v. Rail-

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road, 179 Mo. App. 534; Farmer v. Railway, 178 Mo. App. 594; Cooper v. McFarlen, 184 Mo. App. 184; Crader v. Railroad, 181 Mo. App. 542; Dorsey v. Railroad, 175 Mo. App. 164; Spalding v. L. & M. Co., 183 Mo. App. 657; Craig v. Railways Co., 175 Mo. App. 616. The Springfield Court of Appeals has announced it in: Foster v. United Zinc Co., 189 Mo. App. 288; Quinley v. Traction Co., 180 Mo. App. 287. And the Kansas City Court of Appeals in: Steele v. Ancient Order of Pyramids, 125 Mo. App. 682; Forge Co. v. Engine Co., 135 Mo. App. 89; Heller v. Ferguson, 189 Mo. App. 490; Davis v. Railroad Co., 192 Mo. App. 422. (a) The instruction submits to the jury the proper theory of negligence and is abundantly supported by the evidence. Van Verth v. Cracker Co., 155 Mo. App. 299; Johnson v. Bolt & Nut Co., 172 Mo. App. 214; Hawkins v. Railroad Co., 189 Mo. App. 201, 219; Koerner v. Car Co., 209 Mo. 141. (b) The instruction does not assume the negligence of the defendant or his foreman. (c) When the jury were required by the instruction to find that the defendant did not exercise ordinary care to prevent the board from falling, and that in failing to exercise ordinary care to prevent the board from falling defendant was guilty of a careless and negligent act, they of necessity were required to find that it was negligence to permit the board to remain there under the conditions which existed. Geary v. Railway, 138 Mo. 259; Dammann v. St. Louis, 152 Mo. 198; Phippin v. Railway, 196 Mo. 347; Brady v. Railroad, 206 Mo. 538; State v. Grayor, 89 Mo. 605.

GRAVES, C. J.—*Certiorari* to the Kansas City Court of Appeals, by which it is sought to quash the record of that court in the case of Marguerita Clark, appellant, v. John C. Long, respondent. Long is a contractor and builder in Kansas City, Missouri, and Marguerita Clark is the widow of Frank Clark, deceased, who came to his death by being struck with a piece of board, which fell from the roof of or scaffolding beside a certain dwelling house then being constructed by Long. The house was in the course of construction, and on the north side thereof were two dormer windows. The sheeting had not all been fully

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placed upon the east dormer window. There was a scaffold on this north side of the house, which was being used in the course of the work. The evidence shows that in the course of the work then being done, pieces of boards one inch thick, six inches wide and of lengths ten to sixteen feet were being used, as sheeting, and that to make proper breaks in the roof, and to cover the dormer windows, some of these boards were sawed into shorter lengths. Frank Clark was working in a drive-way leading to the north side of the said house, and near the scaffold on that side, and under the east dormer window. For two days the wind had been blowing quite a gale. The alleged negligence is thus stated in the petition, as we get it from the opinion of the Court of Appeals: "While so working on said retaining wall said deceased was struck in the head with a heavy board or timber, which said defendant, his foremen, superintendents and vice-principals in charge of and directing said work carelessly and negligently caused, suffered, or permitted to fall from said residence or some of the scaffolding about said residence when said defendant, his foremen, superintendents and vice-principals knew, or by the exercise of ordinary care could have known, that deceased was working at said point, and that he would be liable to be struck and injured by said board or timber."

The evidence does not show in positive terms from whence the board came that occasioned the death of Frank Clark, but it can well be inferred from the facts shown and stated that it was blown either from the roof near the east dormer window, or from the scaffold below the roof.

For the plaintiff the court gave this instruction:

"The court instructs you that if you find from the evidence that on October 28, 1915, and prior to Frank Clark's injury, defendant's workmen had piled loose pieces of lumber across the top of the east dormer window on the north side of the roof of the building in question (if you so find), and that at said time a strong wind was blowing (if you so find), and that said boards were thereby liable to be dislodged and

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fall and injure persons who might be working near said residence (if you so find), and that Frank Clark, deceased, was at the time herein referred to engaged in laying stone in the automobile driveway leading to said residence from the north (if you so find), and was working in close proximity to the north wall of said residence, and at a point where he might be struck and injured by the falling of one of said boards (if you so find), and that defendant's foreman in charge of said work knew, or by the exercise of ordinary care could have known the foregoing facts (if you find them to be facts) in time by the exercise of ordinary care to have prevented any of said boards from falling, and that he carelessly and negligently failed to do so (if you so find); and if you further find from the evidence that previous to Frank Clark's injury defendant's workmen had also laid loose pieces of lumber upon the top scaffold on the north side of said building, over the place where Frank Clark was working, and that said scaffold was so constructed that it vibrated and that there was danger of said loose pieces of lumber (if any) falling from said scaffold and injuring Frank Clark, and that defendant or his foreman knew, or by the exercise of ordinary care could have known, these facts (if you so find them) in time by the exercise of ordinary care to have prevented any of said loose pieces, if any, from falling from said scaffold and injuring Frank Clark, but negligently failed to do so (if you so find); and if you further find that thereafter on said date one of said boards (if any) fell, either from said scaffold, by reason of the vibration thereof (if any), or from said dormer window, by reason of being dislodged by the wind (if any), and struck Frank Clark on the head (if you so find), and as a result thereof his skull was fractured and he thereby received injuries from which he died on or about October 30, 1915, and if you further find that plaintiff is the widow of Frank Clark, deceased, then you shall find a verdict in favor of the plaintiff and against the defendant."

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Plaintiff had a verdict *nisi* for \$10,000, which was reduced by *remititur* to \$7,500. The trial court granted defendant a new trial on the ground that it was error to have given this instruction. Of this instruction the Court of Appeals said (Clark v. Long, 196 S. W. 409, l. c. 413):

"The instruction is further criticised for the reason that it permits the jury to find for plaintiff without finding that the hypothetical facts stated in the instruction, if true, would constitute negligence. We think this criticism of the instruction is well taken. While it is true that the jury were required to find by the instruction that the defendant did not exercise ordinary care to prevent said board from falling, and that in failing to exercise ordinary care so to prevent said boards from falling, defendant was guilty of a careless and negligent act, still it does not require the jury to find that the boards piled upon the dormer window or the scaffold were negligently permitted to remain there after they were or could have been discovered.

"The question as to whether defendant and his foreman were negligent in permitting the boards to remain at said places after they could have discovered their presence, was one for the jury, and the court should have required the jury to find that it was negligence for defendant to have so permitted them to remain. Defendant was not negligent as a matter of law in so permitting the boards to remain in such places. It was necessary in the progress of the building of the residence to have these pieces of boards near at hand as the men were working upon the siding and sheeting at the time and must of necessity have had the boards near at hand in order to carry on their work with reasonable celerity. It was necessary for these carpenters to have a place where they could temporarily place timbers which they were to use and it was for the jury to say that the places in which they actually placed the timbers were reasonably safe places under all the circumstances. We believe that this instruction taken alone was erroneous. [Lukamiski v. Foundries, 162 Mo. App. 631; Glaser v. Rothschild, 221

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Mo. 180; Cross v. Northern Central Coal Co., 186 S. W. 528.] However, all of the instructions given, both for plaintiff and defendant, must be read together and if all of the instructions fairly state the law, then the vice in plaintiff's instruction is cured, and this is so even if the vice in plaintiff's instruction appears in the instruction purporting to cover the entire case. [Bliesner v. Distilling Co., 174 Mo. App. 139.]

"On behalf of the defendant the court instructed the jury that 'before you can find for the plaintiff you must find from the evidence that either John Long, the defendant, or Ed. Marrs, his foreman, did something a reasonably careful man under the same circumstances would not have done, or failed to do something a reasonably careful man would have done under such circumstances, and thereby caused the death of Frank Clark.' And in another instruction the court instructed the jury that if Frank Clark was killed as the result of a mere accident, then they could not find for plaintiff, and 'by accident as used herein is meant an occurrence or casualty happening without the fault or negligence of the defendant or injured party.'

"The failure of plaintiff's instruction to have the jury find that it was negligence on the part of the defendant to have permitted the boards to remain at the places given was merely an omission that might be supplied by other instructions, and we believe that this omission was fully covered by these instructions to which we have referred."

This holding is charged to be in conflict with our rulings. The Court of Appeals likewise held that the petition stated a good cause of action, and this is charged as conflicting with this court. It is also charged that the court was without jurisdiction. In relator's petition for our writ it is said: "At the time plaintiff filed her affidavit for appeal there was no money judgment in existence. The amount claimed in the petition was ten thousand dollars and the amount in dispute was ten thousand dollars, which was in excess of the jurisdiction of the Kansas City Court of Appeals. [Powers v. Missouri Pacific Railway Co., 262

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Mo. 701, l. c. 705; Eads v. Kansas City Electric Light Co., 180 S. W. 994.]”

The Court of Appeals reversed the ruling *nisi* as to new trial, and reinstated the judgment for \$7,500. Further details, if necessary, will follow in the course of the opinion.

I. As to the jurisdiction of the Court of Appeals to hear the case of Clark v. Long on the appeal of plaintiff Clark, we have no doubt. This matter is not expressly ruled in the opinion, but the whole case shows that the court assumed jurisdiction, *Appellate Jurisdiction.* and this court can always quash the record of a Court of Appeals in a case wherein such court had no jurisdiction. And we will quash, and have quashed, such records, without reference to the matter of harmony of opinions. To illustrate: If it appears that the Court of Appeals has exercised appellate jurisdiction in a case wherein the judgment was for \$10,000, we would (without reference to the mere harmony of opinions) quash such record, because such court would have no jurisdiction over an appeal in that case. So in the case at bar the question of jurisdiction is challenged upon the ground of jurisdiction, other than that of refusing to follow our last ruling, as well as upon the ground of such failure. The question of jurisdiction is therefore here in its double aspect (1) that the Court of Appeals had no jurisdiction at all over the appeal in the case of Clark v. Long, and (2) that it exceeded its constitutional jurisdiction in deciding questions of law contrary to the last ruling of this court upon such questions of law.

Plaintiff was the appellant. She had sued for \$10,000 and obtained a verdict for \$10,000. This verdict the court set aside on the ground of error in the instruction which we have set out in full in our statement. The court *nisi* then set aside this order granting a new trial, and thereupon the plaintiff entered a *remittitur* of \$2,500, reducing the verdict to \$7,500, and upon defendant's motion for new trial, the trial court again sustained the motion and set aside the reduced verdict of \$7,500, and granted a new trial. It is from

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this last order that the appeal was taken. To my mind it is clear that the amount involved upon this appeal is \$7,500, and if so the Court of Appeals had jurisdiction. By setting aside the verdict of plaintiff for \$7,500, the plaintiff only lost \$7,500. If the order for new trial was reversed and the verdict reinstated (as was done), the plaintiff would gain but \$7,500 by the action of the Court of Appeals. She would gain just what she lost *nisi*, i. e. \$7,500. If the Court of Appeals had affirmed the order granting the new trial, the plaintiff would have only lost the verdict of \$7,500, and no more. So too, as to the defendant. When the verdict was reduced to \$7,500, the defendant's liability was then fixed at that sum. When the court *nisi* set aside this verdict for \$7,500 the defendant gained but \$7,500, and had the Court of Appeals affirmed the order, it could have gained no more by that action of the Court of Appeals. On the other hand if the Court of Appeals reversed the order *nisi* (as it did) it only reinstated a liability of \$7,500, and no more. So from the standpoint of both appellant and respondent, the amount involved in the Court of Appeals was only \$7,500, and it is the amount involved in that court, which fixes the jurisdiction, and not what may be involved in the trial court on a new trial. The amount of the verdict set aside in the order granting a new trial, is the amount which fixes appellate jurisdiction in cases where plaintiff appeals from the order setting aside such verdict. Both Divisions of this court have so ruled. [Culbertson v. Young, 156 Mo. 261 (Div. Two.); Williams v. Railway Co., 233 Mo. l. c. 672, 674 (Div. One.).] The rule so announced should stand, and from it we are compelled to hold that as to amount the Court of Appeals had jurisdiction of the case involved in the present proceeding.

II. By the relator we are asked to direct a judgment in the case, brought here by our writ, and this is another preliminary question which had best be eliminated at the outset. The case now on *Certiorari* before us is the *certiorari*. In this case we can only uphold or quash the record of the

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Court of Appeals. At most we deal only with that record, and not with the case proper on its merits or demerits. [State ex rel. v. Ellison, 268 Mo. 238.] We have quashed a part of the opinion and sustained the remainder of the opinion and the judgment, because the reason assigned in the unquashed portion of the opinion made the judgment right, but this is as far as we have ever gone. [State ex rel. v. Reynolds, 194 S. W. 878.] If we quash the record of the Court of Appeals we have no right to tell that court what to do when it undertakes to make a new record in the case. It will be presumed that upon questions ruled, such court will follow our rulings.

III. The basis of this action is negligence. In such cases there are but two possible theories to be adopted by the trial court when such court comes to **Instruction**, instructing the jury, and they are (1) the trial court may say that if the jury find that the defendant did certain things, or omitted to do certain things, then such act or acts of the defendant would constitute negligence as a matter of law, and (2) the trial court could say to the jury that if the jury found that the defendant had done or had omitted to do specified acts, and that the doing of such things, or the failure to do such things, was negligence, as negligence was elsewhere defined, then the jury should find for the plaintiff. In other words the court might declare that the proven acts constituted negligence, or it might submit such acts to the jury, and let the jury determine the question of negligence or no negligence.

It is clear in this case, under the recited facts, that the question of negligence or no negligence was a question for the jury, and not for the court. The Kansas City Court of Appeals has so viewed it in the opinion now before us for review. That court further says (196 S. W. l. c. 413) as to instruction numbered 1 given for the plaintiff:

"The instruction is further criticized for the reason that it permits the jury to find for plaintiff without finding that the hypothetical facts stated in the instruc-

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tion, if true, would constitute negligence. We think this criticism of the instruction is well taken. While it is true that the jury were required to find by the instruction that the defendant did not exercise ordinary care to prevent said board from falling and that in failing to exercise ordinary care so to prevent said boards from falling, defendant was guilty of a careless and negligent act, still it does not require the jury to find that the boards piled upon the dormer window or the scaffold were negligently permitted to remain there after they were or could have been discovered.

"The question as to whether defendant and his foreman were negligent in permitting the boards to remain at said places after they could have discovered their presence, was one for the jury, and the court should have required the jury to find that it was negligent for defendant to have so permitted them to remain. Defendant was not negligent as a matter of law in so permitting the boards to remain in such places. It was necessary in the progress of the building of the residence to have these pieces of boards near at hand as the men were working upon the siding and sheeting at the time and must of necessity have had the boards near at hand in order to carry on their work with reasonable celerity. It was necessary for these carpenters to have a place where they could temporarily place timbers which they were to use, and it was for the jury to say that the places in which they actually placed the timbers were reasonably safe places under all the circumstances. We believe that this instruction taken alone was erroneous."

The court then undertakes to point out how the omission of this instruction was cured by two instructions given for defendant. In other words the Court of Appeals says that this instruction for plaintiff did not require the jury to find the defendant guilty of a certain negligence, which negligence was of the very essence of plaintiff's case, and without which plaintiff had no case. The character of this instruction must not be overlooked. It is an instruction intended to cover the whole case for the plaintiff. It requires the jury to

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find certain things, and then says to the jury that if you do find such things you will find for plaintiff. In an instruction of this kind, the Court of Appeals finds that a necessary element of plaintiff's case is not presented to the jury at all. Before plaintiff was entitled to recover it was necessary for the jury to say that certain acts of the defendant constituted negligence, and this question of negligence or no negligence, was not submitted to the jury, as found by the Court of Appeals and yet a direction was given to find for plaintiff. Such a defect in such an instruction, if there is such defect, cannot be cured by any instruction given to recover it was necessary for the jury to say that for the defendant. It is not necessary for us to find that there is such defect in the instruction. The Court of Appeals says there is such defect, and violates our rule when it says it was cured.

Where an instruction for the plaintiff undertakes to cover the whole case, and where such instruction contains a direction to find for the plaintiff, provided the jury find the hypothetical facts mentioned in the instruction in plaintiff's favor, and where such instruction omits a hypothetical fact which must be found in favor of plaintiff before there can be a recovery, then the omission of the last named hypothetical fact cannot be cured by any instruction given for the defendant. In such case, instead of the defendant's instruction curing the omission, it produces a conflict in the instructions. This, because the plaintiff's instruction authorizes a verdict for plaintiff without any finding for plaintiff upon a vital question, and if the defendant's instruction requires a finding for plaintiff upon this vital question, before plaintiff is permitted to recover, then there is a conflict, which is both pointed and dangerous. Which instruction will the jury follow? The one for plaintiff which directs a verdict for her on the more limited question of facts, or the one for defendant which requires the finding of additional facts? Imagine an ordinary jury discussing the matter. Mr. A. (on the jury) reads the defendant's instruction, and says, "We can't find for plaintiff unless we find this

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fact," but Mr. B (likewise on the jury) answers, "Yes we can, just read instruction numbered 1 for plaintiff. It tells us that we should find for plaintiff if we find these facts [reading the hypothetical facts], and says nothing about what you suggest." Thus the conflict is made apparent.

In the case at bar (according to the ruling of the Court of Appeals), the instruction which directed a verdict for plaintiff left out of consideration one of the vital facts necessary to be found before a recovery could be had, and when such occurs in an instruction purporting to cover the whole case, as here, an instruction for defendant requiring a finding of that fact does not cure the plaintiff's instruction, but conflicts therewith. To further illustrate: Plaintiff's instruction covering the whole case and directing a verdict for plaintiff says, "If you find that plaintiff walked from A to B and then from B to C you will find for the plaintiff." Defendant's instruction says, "Unless you find that the plaintiff walked from A to B, and then from B to C, and then from C to D, you must find for defendant." Does defendant's instruction cure the defect in plaintiff's instruction (granting that there could be no recovery until the three distances were covered) or does it conflict therewith? Clearly the latter. So too, where there are three necessary facts in a negligence case, if the instruction for the plaintiff undertakes to cover the whole case, and directs a verdict, and leaves out one of the three necessary facts, no instruction for the defendant requiring a finding on this omitted fact can be given without being in conflict with the instruction for the plaintiff. The jury can't tell whether they must find only two facts or all three.

In the case of Wojtylak v. Coal Co., 188 Mo. l. c. 283, GANTT, J., makes this matter clear, in this language: "Plaintiff's instruction is a very long and general one and concludes with the direction that 'If you find these facts from the evidence in the case your verdict will be for the plaintiff.' This being so, the giving of a proper instruction for the opposite party could not have the effect of correcting the error, as the

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two would be in conflict, and the jury at a loss to know which to obey. If the plaintiff's said instruction had fully covered all the necessary facts which the jury must find and the defendant's instruction had required the finding of a fact which was not necessary and thus had been more favorable to the defendant than the law allowed, then defendant could not have complained, but such is not the case with the instructions under review. [State v. Herrell, 97 Mo. 105; Gay v. Gillilan, 92 Mo. 250; Frederick v. Allgaier, 88 Mo. 598.] The jury might well have concluded under plaintiff's instruction that it was not at all necessary to have found that the roof of the mine was in fact dangerous, and that defendant knew, or by the exercise of ordinary care could have known that it was, but that the mere fact that defendant's pit boss ordered the plaintiff to go to work therein, coupled with the fact that the part of the roof did fall, was all that was necessary to entitle plaintiff to a verdict."

The same doctrine is announced by WILLIAMS, C., in Hall v. Coal & Coke Co., 260 Mo. l. c. 367, and it was because we deemed the opinion of the Kansas City Court of Appeals in direct conflict with these two cases that our writ of *certiorari* was granted. The hearing in this court has not changed our views. We are convinced that the ruling by the Court of Appeals conflicts with the cases, *supra*, and that for this reason, if not for others, their record should be quashed.

The St. Louis Court of Appeals has taken the foregoing view of our cases. Thus in Traylor v. White, 185 Mo. App. l. c. 331, it is said: "The rule is, that where plaintiff's instruction covers the whole case and authorizes a verdict for plaintiff on an erroneous theory of the law, one on the part of defendant touching the same matter will not supply a deficiency in plaintiff's instruction which omits to require the finding of facts essential to sustain the cause of action." The court cites Wojtylak v. Coal Co., 188 Mo. 260, as authority for the rule.

In Humphreys v. Railroad, 191 Mo. App. l. c. 721, it is likewise said: "On this question the most recent

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ruling in the Supreme Court goes to the effect that where plaintiff's instruction authorizing a verdict for him covers the whole case but omits a ground of negligence essential to his recovery, such may not be cured by another one of plaintiff's instruction, which is amply sufficient with respect to the matter omitted. [See Hall v. Coal & Coke Company, 260 Mo. 351.]"

The citation, supra, made by the Court of Appeals, is the page where the case begins. The local citation is 260 Mo. l. c. 369, where Judge WILLIAMS uses this language: "Neither can we say that the defect in instruction number 1 was cured by the giving of plaintiff's instruction number 3 which undertakes to set forth what facts would constitute a negligent assurance, etc. The terms, 'negligent assurance' or that the 'assurance was negligently given' are not contained in instruction number 1, and it could not be said that a definition of those terms would make clear the meaning of instruction number 1 which did not contain such terms. Furthermore, even though instruction number 1 had contained those terms, all the facts constituting the actionable negligence should be required to be found by this instruction which attempted to cover the entire ground of actionable negligence." (The italics are ours.)

To like effect is Walker v. White, 192 Mo. App. l. c. 19, where it is said: "In this view, defendant's instructions are not to be invoked in aid of that given on behalf of plaintiff in the instant case, for the omission relates to a material element of plaintiff's cause of action, which is to be found as a prerequisite to her right to recover. The instruction for plaintiff is, therefore, inconsistent with that of defendant." In the foregoing the court again cites the case of Wojtylak v. Coal Co., 188 Mo. 260,

Lastly in the case of Pearson v. Lafferty, 193 S. W. l. c. 43, the St. Louis Court of Appeals again reiterates their understanding of our rule: "It is unnecessary to discuss the instruction given and refused. It may be well to note, however, that plaintiff's first instruction is fatally defective, irrespective of the theory upon

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which it proceeds, in that it purports to cover the entire case, but leaves out of consideration elements essential to plaintiff's recovery. It is held that an instruction which purports to cover the entire case, and directs a verdict, cannot be pieced out by other instructions, despite the oft stated rule that instructions must be read and considered together. [See *Hall v. Coal & Coke Company*, 260 Mo. l. c. 369.]"

In our judgment the St. Louis Court of Appeals has properly construed our rule, and the Kansas City Court of Appeals has misconstrued it in the case before us. Our rule is, that if the instruction for the plaintiff purports to cover the whole case and directs a verdict, then if it be found that such instruction has omitted a necessary element requisite to the right of plaintiff to recover, then such omission is not, and cannot be cured by an instruction given for the defendant.

The instructions are in conflict, rather than the one curing the other. So in the case at bar the Kansas City Court of Appeals violated the rule of this court when it held that the patent defect of instruction numbered 1 for plaintiff was cured by instructions given for the defendant.

IV. We shall not discuss the sufficiency of the petition for the reason that for the error in instruction numbered 1, the Kansas City Court of Appeals

Petition. will no doubt remand the case to the circuit court for a new trial, and the counsel for plaintiff in the light of the discussion of the question, may conclude to amend their petition, so that the question now urged may not be a vital one in the ultimate determination of the case. The negligence charged is of the most general character, as will be seen, and the facts are now before the parties. Of course in cases where the doctrine *res ipsa loquitur* applies, general negligence is permissible in the pleading, but for the reason last above indicated we will not now determine whether either the facts pleaded or proven bring the case within the rule. It is sufficient to say that the present record of the Kansas City Court of Appeals should be quashed

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for the reasons stated in the preceding paragraph. It is so ordered.

All concur, except *Bond* and *Blair, JJ.*, who dissent, *Blair, J.*, in separate opinion.

BLAIR, J. (dissenting)—The Court of Appeals held an instruction bad. It then held the error cured. In this last holding its opinion conflicts with decisions of this court. This would warrant quashing the record only in case the instruction is in fact erroneous. I do not think it is. In such circumstances, nothing further appearing, the rule in State ex rel. v. Reynolds, 270 Mo. l. c. 602, 603, is applicable, hence this dissent.

THE STATE ex rel. GEORGE A. WAHL v. GEORGE D. REYNOLDS et al., Judges of St. Louis Court of Appeals.

In Banc, December 22, 1917.

1. **CERTIORARI: Conflict in Decisions: Errors Considered.** In a *certiorari* to have a decision of a court of appeals declared void for that it conflicts with the last previous ruling of the Supreme Court, the scope of review does not extend to any errors of opinion on the part of said court of appeals which do not conflict with the latest previous rulings of the Supreme Court. The Supreme Court, in such case, is not called upon to determine whether the views as expressed by the court of appeals are correct or incorrect, but is only to decide whether they conflict with a controlling decision of its own.
2. **—: —: Confined to Majority Opinion.** The review by the Supreme Court upon *certiorari* of a decision of a court of appeals alleged to be in conflict with the last previous rulings of the Supreme Court, does not embrace any consideration of the record of the case in the court of appeals further than the same is set forth in its majority opinion under review.
3. **—: —: Fraud and Deceit: Evidence of Mental Incapacity: Not Pleaded.** A ruling by the Court of Appeals that evidence that the plaintiff, in a legal action for fraud and deceit, was a man of weak mentality, inexperienced, over-credulous and unqualified in business dealings, although not pleaded, was admissible.

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sible under general allegations that defendant knowingly made false and fraudulent representations, with the intent and purpose of deceiving plaintiff and that relying thereon he was deceived and led to enter into the contract, to his damage, is not in conflict with any prior decision of the Supreme Court, for said court has never made any ruling on the point, and, therefore, whether said ruling be right or wrong, the Supreme Court has no jurisdiction, by its writ of *certiorari*, to quash said decision.

Held, by GRAVES, C. J., dissenting, with whom BLAIR and WOODSON, JJ., concur, that the evidence which tended to show that plaintiff was weak-minded not only broadened the issues made by the pleadings but contradicted the terms of plaintiff's petition, since allegation that he contracted with defendant relying upon his false statements carried with them the presumption that plaintiff was mentally normal; and such presumption, or legal inference from the facts pleaded, is just as much a part of the petition as if written therein in express words; and to permit him to prove a weak mentality, not only broadens the pleadings, which is a course condemned by many cases of the Supreme Court, but is a contravention of the solemn admissions of his own pleading, and therefore the ruling of the Court of Appeals should be quashed.

Held, also, that the Supreme Court on *certiorari* is not confined to the suggested conflicts in decisions stated in the briefs, but knowing of other conflicts should act in the interest of harmony of opinions.

Certiorari.

WRIT QUASHED.

John Cashman for relator.

The majority opinion and judgment of the St. Louis Court of Appeals in the case of Flack v. Wahl, in deciding that evidence of the lunacy or mental incapacity of Flack may be given in evidence to the jury without being pleaded, or made an issue by the pleadings, failed and refused to follow the last controlling decisions of the Supreme Court on that question and that decision and judgment should, therefore, be set aside and annulled by this court. The decisions so disregarded by the Court of Appeals are: Caldwell v. Reed, 198 Mo. 379; Wells v. Mutual Benefit Assn., 126 Mo. 637;

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Rhoades v. Fuller, 139 Mo. 187; Jamison v. Culligan, 151 Mo. 416; Blunt v. Spratt, 113 Mo. 48; McKenzie v. Donnell, 151 Mo. 454, 455; McFarland v. Mo. Pac. Ry. Co., 125 Mo. 276; Harris v. Craven, 188 Mo. 609; Och v. Railroad, 130 Mo. 74; Chitty v. Railroad, 148 Mo. 64; Cobb v. Lindell Ry., 149 Mo. 144; Mark v. Cooperage Co., 204 Mo. 261. Other cases and text-writers sustaining the doctrine are: Banking Co. v. Loomis, 140 Mo. App. 62; 2 Chitty on Pleading, 436; Harrison v. Richardson, 1 Mood. & Rob. 504; Jackson v. Van Densen, 5 Johns. 144; Alcock v. Alcock, 3 M. & G. 147, 268; Kendall v. May, 10 Allen, 59; Jackson v. Caldwell, 4 Cowen, 207; Edwards, Bills & Notes (3 Ed.), sec. 26; Byles on Bills and Notes (8 Ed.), sec. 64; Randolph on Commercial Paper, sec. 251. The majority opinion says, in discussing the admissibility of this evidence: "Were the action one to rescind the contract on the ground that Flack was mentally incapable of contracting, the question would be quite a different one." Meaning, of course, that then the mental incapacity would have to be pleaded before proof thereof may be offered. This part of the opinion is further in conflict with the last controlling decisions of the Supreme Court on that point. Much stricter requirements apply in actions for damages on ground of fraud than on actions to rescind. McFarland v. Railroad, 125 Mo. 276; Harrison v. Craven, 188 Mo. 608. To like effect are the following text-writers: 20 Cyc. 11; Greenleaf on Evidence (16 Ed.), p. 37, sec. 14; 2 Wigmore on Evidence, p. 25, sec. 1904.

R. P. Williams and C. B. Williams for respondents.

(1) All facts from which the ultimate and conclusive facts may be inferred are evidential and need not be stated; but those facts from which the legal conclusion is to be drawn, upon which the right of action depends, must be stated. Mental weakness is simply an evidential fact, from which the ultimate fact—namely, reliance—may be inferred. Fogle v. Pindell, 248 Mo. 72; Bragg v. Met. St. Ry., 192 Mo. 350; Bailey v. Kan-

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sas City, 189 Mo. 514; Planet v. St. Louis, 115 Mo. 619; Alcorn v. C. & A., 108 Mo. 91; Robertson v. Wabash, 84 Mo. 121; Murphy v. Price, 48 Mo. 250; Sawyer v. Walker, 204 Mo. 157; Moormeister v. Hannibal, 163 S. W. (Mo. App.) 928; See v. Cox, 16 Mo. 168; Mitchell v. Clinton, 99 Mo. 153; Edgell v. Sigerson, 20 Mo. 494 and 497; Kinsolving v. Kinsolving, 194 S. W. (Mo. App.) 530; Patterson on Missouri Code Pleading (2 Ed.), secs. 66, 127, 146. (2) In a *certiorari* proceeding it is not a question as to whether or not the opinion of the Court of Appeals is sustained by authority, but the sole question is whether it contravenes one of the Supreme Court rulings upon a similar state of facts. State ex rel. v. Robertson, 197 S. W. (Mo.) 79; State ex rel. v. Ellison, 269 Mo. 151. (3) A party cannot be surprised that his adversary introduced testimony in support of the issues made by the pleadings, even though such testimony is false. McWhirt v. Railroad, 187 S. W. (Mo.) 830; Byrd v. Vanderburg, 168 Mo. App. 120; Bragg v. Moberly, 17 Mo. App. 22; Haynes, New Trial, par. 79; Shore v. Powell, 76 S. E. (W. Va.) 126.

BOND, J.—I. This is an application by *certiorari* to declare the majority opinion of the St. Louis Court of Appeals to be void for want of jurisdiction, in that the legal doctrine announced in that decision was in conflict with the last previous rulings of this court in the cases cited by relator.

The point, as to which the petitioner alleges errancy in the opinion of the Court of Appeals, depriving it of jurisdiction, is so much of its opinion as affirms the admissibility of evidence tending to show the plaintiff in a legal action for fraud and deceit was a man of weak mentality, inexperienced, over-credulous and unqualified in business dealings, and therefore more likely to rely upon the false representations of defendant than if he had been a man of average capacity. It is urged on the part of the relator that such evidence was inadmissible in view of the fact that the petition filed by plaintiff stated the facts necessary to the sustention of

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an action for damages for fraud and deceit, without any averment of any insufficiency on the part of plaintiff in the respects shown by the testimony.

In dealing with the point thus presented to it, the majority opinion of the Court of Appeals (after reciting the substance of the testimony tending to show that plaintiff was weak-minded and easily influenced) disposed of the question as follows (*Flack v. Wahl*, 193 S. W. 56, l. c. 60):

"The only question before us in this connection is whether testimony of this character is admissible at all in the absence of an allegation in the petition to the effect that plaintiff Charles D. Flack was weak-minded or mentally incapable of protecting himself in a business transaction. . . .

"From the record before us it appears that the trial court ruled as it did upon the theory that this testimony was admissible under the allegation of the petition that plaintiffs relied upon the alleged false representations of defendant, believing them to be true, and were thereby induced to enter into the contract in question and consummate the same. A consideration of this assignment of error has led us to the conclusion that this view is sound. It was, of course, unnecessary for plaintiffs to plead anything respecting the mental capacity of plaintiff Charles D. Flack as an essential element of their action for fraud. The petition alleges all of the substantive facts constituting the cause of action sued upon. Among these is the necessary averment that plaintiffs relied upon the representations alleged to have been made to them. It was essential that plaintiffs sustain this averment by proof, and it would seem that it was proper to receive for this purpose any evidence having any probative force and effect—and not otherwise inadmissible—which tended to support such averments. An allegation that Flack was weak-minded would seem to have no proper place in this petition. The Code requires a plain and concise statement of the facts constituting the cause of action (Sec. 1794, R. S. 1909), and provides that only the substantive facts nec-

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essary to constitute the cause of action shall be stated (Sec. 1813, R. S. 1909), and provides further that a party shall not be required to state evidence in his pleading or to disclose therein the means by which he intends to prove his case (Sec. 1818, R. S. 1909). Here the substantive facts to be alleged are that defendant made certain specified false representations of material facts in connection with an exchange of properties; that defendant knew such representations to be false or made them of his own knowledge when he had no knowledge as to their truth or falsity; that they were made with the intent and purpose that they be acted upon by plaintiffs, and that plaintiffs did rely and act thereupon, to their damage. All of these substantive facts were properly alleged. It would have been unnecessary and improper to plead the evidence by which plaintiffs expected to prove such substantive facts. The fact that Charles D. Flack was weak-minded, if true, was not one of the substantive facts constituting the cause of action, and hence was not alleged. Were the action one to rescind the contract on the ground that Flack was mentally incapable of contracting, the question would be quite a different one. But in the instant case it seems quite clear that the question is not whether plaintiffs should have pleaded this matter, but whether evidence of this character is admissible at all in an action of this precise character. It was not admissible for any purpose except to prove that the representations were relied upon. In such cases reliance is a question of fact, to be established not alone by a party's own assertion, but to be gathered from probative facts and circumstances which cast light upon the matter. And if the party alleging fraud be ignorant, inexperienced or of weak intellect, and hence guileless and readily susceptible to the artful designs of a fraud-feasor, and easily imposed upon, proof thereof ought to be held admissible in support of the allegations of reliance. Particularly is this true here, we think, since defendant strongly contended and sought to make it appear that plaintiffs had

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full opportunity to investigate, and did investigate, and are not in a position to assert that they relied and acted upon the representations alleged.

"In a leading encyclopedic compendium of our law, the rule concerning this matter is thus stated:

"‘Evidence is admissible of any facts tending to show reasons for reliance upon defendant’s representations—as that the discovery of the true condition of things was difficult, that the relations of the parties were of a confidential nature, that plaintiff was ignorant of the matters to which the representations related while defendant was familiar with them, or *that plaintiff was of weak intellect and easily imposed upon.*’ [See 20 Cyc. 117.] (Italics ours.)

"In Bloomer v. Gray, 10 Ind. App. 326, cited in support of the italicized portion of the text above quoted, the action was one for fraud and deceit. A witness was permitted to state that the plaintiff was weak-minded at the time of the transaction in question. As to the propriety of admitting his testimony, the appellate court said:

"‘We fully concur in the statement of counsel for appellant, that the *gravamen* of the action is not to recover on account of the weak-mindedness of the appellee, but we cannot for that reason say that this evidence was not competent; on the contrary, we think it was proper for the purpose of showing his susceptibility to the representations of the decedent. The representations made, if false, would have created a liability against the decedent, whether the appellee was weak-minded or not, and to show that he was weak-minded did not increase the liability or entitle him to a recovery which otherwise he did not have. The fraud consisted in misleading the appellee and then taking advantage of him after he had been thus deceived. Any fact which tends to throw light on the manner in which the artifice was perpetrated is proper. True, the wrong done was no greater on account of appellee’s weak mental condition, yet he was probably more susceptible to the wiles and cunning of the artful than if his mental faculties

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were strong and unimpaired. The jury were to determine the question of fraud from all the facts and circumstances, hence were entitled to know not only what the representations were which the decedent made, but what the probable effect of the same was upon the mind of the appellee, and what influence, if any, they had upon his making the trade.'

"It is true that in that case the petition alleged that certain false representations were made to plaintiff, 'who was weak-minded.' But these words, thus thrown into a petition charging actual fraud, did not, in our opinion, affect the question of the admissibility of the testimony mentioned. And it appears from the quotation above that the court so considered the matter, and placed its ruling upon the ground that the testimony was admissible under the allegation of reliance.

"In Cummings v. Thompson, 18 Minn. 246, a similar question was considered. The action was upon a promissory note and the defense was one of fraud in obtaining the note, without consideration, perpetrated by the payee, through a false reading thereof to defendant. It was not alleged that the defendant was unable to read. A portion of the opinion is as follows:

"'We are also of opinion that under the allegation that the defendant relied upon and believed the false reading and misrepresentations of the contract by Ensign, and was misled thereby, it was competent for the defendant to prove the facts offered to be proved relating to his inability to read. The averment that the defendant relied on, and believed, the reading of the contract, and the representations of its contents by Ensign, is an allegation of fact and essential to constitute a fraud. . . . And it would seem to be apparent, that the evidence offered of the inability of the defendant to read, in connection with the facts that he executed the contract without reading it, or further inquiry, would tend directly to show that in thus executing the instrument he did, in fact, rely upon and was misled by Ensign's reading and misrepresentations of it. The defendant's inability to read is, therefore, merely a

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specific fact which goes to support the general allegations in the pleadings and need not be specially stated.'

"These authorities we regard as here in point, and strongly persuasive in support of respondent's position. We are referred to no case in this State directly in point. A multitude of our cases might be cited in support of the general principles which we have attempted to state and apply above, but it is unnecessary to encumber the opinion with such citations."

In the rulings of this court permitting the use of a writ of *certiorari* in cases like the present (in which I am unable to concur) it is distinctly announced, as I understand, that the scope of review does not extend to any errors of opinion on the part of the Court of Appeals, which *do not conflict* with the latest previous rulings of this court on the subject, nor does it embrace any consideration of the record of the case in the Court of Appeals further than the same is set forth in the opinion under review. It follows that we are not called on to determine whether the above quoted views of the Court of Appeals are correct or incorrect, but simply whether they *conflict* with a controlling decision of this court.

II. Unless there is a subsisting decision of this court declaring the law to be that evidence tending to prove weak-mindedness and incompetence on the part of the plaintiff in a legal action for fraud and deceit, is not admissible under a petition which alleges fully all the constitutive facts and legal elements warranting a recovery in such an action without a special allegation that the plaintiff was also a weak-minded man and incompetent in business affairs, there is and was no conflict in the opinion of the Court of Appeals with the last previous ruling of this court. None of the cases cited by the applicant for the writ, either expressly or by necessary implication, decided any proposition of law *contrary* to the views expressed in the opinion of the Court of Appeals.

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Chadwell v. Reed, 198 Mo. l. c. 379, was a suit to annul a deed to land on the ground of the alleged mental unsoundness of the grantor. After a thorough review of the testimony the court held that the advisory verdict of the jury on certain interrogatories submitted to them by the chancellor, which the trial court seems to have adopted, was unsupported by any evidence and the decree was reversed. This was a purely equitable action for the rescission or annulment of a contract and contains no hint or suggestion of a ruling contrary to that applied by the Court of Appeals in the distinctively legal action of fraud and deceit. The plaintiff in this case exercised the option, which the law gave him, of bringing a common law action for damages for fraud and deceit, instead of asking for a rescission of the contract and a restoration of the *status quo* by a court of equity, which he might have done by acting seasonably after discovery of the fraud. He chose rather to avail himself of a purely legal redress based upon an adherence to the contract and a right to recover for damages caused to him by the consummation of the contract. [Brown v. Lead & Zinc Mining Co., 231 Mo. l. c. 175, 176; Cottrill v. Krum, 100 Mo. 397.]

Harrison v. Craven, 188 Mo. 590, was a suit in equity to compel a conveyance of property and an accounting for rents and profits, coupled with a count for damages for fraud and deceit and delay and prevention in the construction of a building. It made no announcement whatever of any rule of law applicable to the kind or extent of evidence admissible in a legal action of fraud and deceit under a petition containing sufficient allegations to warrant a recovery in such an action.

Cobb v. Lindell Ry. Co., 149 Mo. 135, does not touch the matter in hand from any point of view. It deals only in general terms with the rule of pleading as applied to a case where suit was brought for personal injuries against a street car company.

Chitty v. Railroad, 148 Mo. 64, is equally off the point, relating simply to the truism that a plaintiff cannot plead one cause of action and recover upon another not pleaded.

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Neither does the decision in *McKenzie v. Donnell*, 151 Mo. l. c. 454, touch the present inquiry. It merely recites that a contract made by an insane person in ward is void and one made by such a person not in ward is only voidable.

So, also, is *Jamison v. Culligan*, 151 Mo. l. c. 416, to a similar effect with a similar citation of authorities in support; but making no announcement in the slightest degree opposed to anything ruled by the Court of Appeals.

The case of *Rhoades v. Fuller*, 139 Mo. 179, was a suit in equity to set aside a contract of an insane person not under guardianship. Nothing said or ruled in the case in any way supports the theory that the Court of Appeals conflicted with any ruling of this court in its opinion in this case.

The case of *Och v. Railroad*, 130 Mo. l. c. 74, contains a discussion as to the probative force of evidence tending to show incapacity to make a contract and a ruling of the *then* state of the law, that the issue of mental incapacity to make a release should not have been submitted to the jury.

The case of *Blount v. Spratt*, 113 Mo. 48, simply related to the circumstances under which a conveyance would be set aside in equity on the ground of the insanity of the grantor, if that was not made known to the grantee at the time of the contract.

Wells v. Mut. Benefit Assn., 126 Mo. l. c. 637, refers only to the voidability of a contract of an insane person not under guardianship.

McFarland v. Railroad, 125 Mo. 253, is a suit for personal injuries. The local citation on page 276 discusses the distinction between legal and equitable rights and remedies though administered in the same court, and can have no bearing on the present proceeding.

Mark v. Cooperage Co., 204 Mo. l. c. 261, simply interprets statutes requiring pleadings to be in writing.

Newham v. Kenton, 79 Mo. l. c. 386, is to the effect that new matter could not be introduced under a general denial.

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It is perfectly plain that none of these citations contain any rulings opposed to the views of the St. Louis Court of Appeals as to the scope of the evidence permissible in an action for fraud and deceit under a petition containing all the allegations necessary to a recovery. It is impossible, therefore, to declare the opinion of that court to be in conflict with the last previous ruling of this court on the point suggested by relator. The learned writer of the dissenting opinion evidently did not deem the opinion of his associates contrary to any decision of this court or any of the courts of appeals or he would have exercised his constitutional prerogative to cause a certification of the case to this court for determination and harmonization of the law.

It follows that our writ was improvidently granted and should be quashed. It is so ordered.

Walker, Faris and Williams, JJ., concur; Graves, C. J., dissents in separate opinion, in which Woodson and Blair, JJ., join.

GRAVES, C. J. (dissenting)—I do not agree with our learned brother, when he concludes that there is no conflict between the opinion of the Court of Appeals and this court. The evidence which tended to show that plaintiff was feeble-minded, not only broadened the issues made by the pleadings, but contradicted the terms of plaintiff's very petition. When plaintiff stated in his petition (without alleging the condition of his mind) that he contracted with defendant, relying upon statements of defendant, which statements were false, and that he was injured thereby, such statements in the petition carried with them all the legal presumptions and inferences growing out of the facts stated. The presumption, under the facts pleaded, is that plaintiff was mentally normal—not weak-minded, feeble-minded, idiotic or insane. This legal presumption, or legal inference from the facts pleaded, is just as much a part of the petition, as if written therein in express words. To permit plaintiff to prove a weak mentality is (1) broadening the issues made by the pleadings, which contravenes a school of cases from this court, and (2)

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contradicting the solemn admissions of his own pleadings. When by *certiorari* we order up the record of a Court of Appeals in order to have their opinion conform to the opinions of this court, we are not confined to the suggested conflicts stated in the briefs. If this court knows of conflict not cited by counsel, we should act in the interest of harmony of opinions. I therefore dissent. *Blair and Woodson, JJ.*, concur in these views.

THE STATE ex rel. WAYNE COUNTY et al. v.
GEORGE E. HACKMAN, State Auditor.

In Banc, December 22, 1917.

1. **REPEALED STATUTE: Continued Operation Thereunder.** Sections 8060 and 8062, Revised Statutes 1909, were intended to continue in force repealed statutes until proceedings commenced thereunder may be completed. Sections 10520 to 10525, Revised Statutes 1909, under which bonds were issued by a county to build public roads, though repealed by the Act of 1917, without a saving clause, were so far kept in force by Sections 8060 and 8062 as to authorize the county court, under Section 1249, to refund the bonds by the issuance of new bonds of the denominations and bearing the rate of interest authorized by said act.
2. _____: _____: **Continued in New Enactment.** Where the purpose and operative force of an existing statute and the one repealing it are the same, differing only in minor particulars, the repealing act is to be construed as a continuation of the one repealed, and proceedings in compliance with the latter prior to its repeal and continued thereafter in conformity with the former are regular and in accordance with legislative direction.
3. **REFUNDING DEBT: Within Twenty Years After Creation.** A statute authorizing the refunding of an existing indebtedness by the issuance of new bonds is not invalid because it does not require the bonds to be paid within twenty years from the time the debt was originally created.
4. _____: **Sale of Bonds to Original Purchaser.** Under Section 1249, Revised Statutes 1909, a county has the right to refund its public road bonds whenever it can do so at a lower rate of interest, and the refunding bonds are not invalid because they were sold to the purchaser of the original bonds.

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Mandamus.

PEREMPTORY WRIT AWARDED.

D. N. Holladay, V. V. Ing, S. G. Ray and Charles & Rutherford for relators.

(1) Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption when the re-enactment takes effect at the same time. 1 Lewis's Sutherland on Stat. Const. (2 Ed.), sec. 238; 36 Cyc. 1083; Brown v. Marshall, 241 Mo. 728; State ex rel. v. Mason, 153 Mo. 58; State ex rel. v. County Court, 53 Mo. 129; Smith v. People, 47 N. Y. 335-342; Moore v. Kenockee Twp., 4 L. R. A. (Mich.) 555; Fullerton v. Spring, 3 Wis. 671; Laude v. Railroad, 33 Wis. 643; Scheftels v. Tabut, 46 Wis. 446; Middleton v. Railway, 26 N. J. Eq. 273; Glentz v. State, 38 Wis. 554; Junction City v. Webb, 44 Kan. 73-4; Swamp Land Dist. v. Glide, 112 Cal. 90; Rock Pav. Co. v. Lyons, 133 Cal. 116; Callahan v. Jennings, 16 Colo. 476; People v. Board of Eq., 20 Colo. 231; Hancock v. Dist. Twp., 78 Iowa, 554. (a) Inchoate statutory rights are not defeated. Capron v. Strout, 11 Nev. 304, 310; Skyrme v. Occidental Co., 8 Nev. 233; Moore v. Kenockee, 75 Mich. 333. (b) Statutory powers are not taken away. Middleton v. Railway, 26 N. J. Eq. 269. (d) Pending proceedings are not affected. Dennison v. Allen, 106 Mich. 296-300. (2) The effect of a repeal upon inchoate rights, and upon incomplete proceedings is avoided by a general statute for that purpose. R. S. 1909, secs. 8060, 8062; 1 Lewis's Sutherland on Stat. Const. (2 Ed.), sec. 287; United States v. Reisinger, 128 U. S. 401; Railroad v. United States, 208 U. S. 464; State ex rel. v. Drainage District, 192 Mo. 517; State v. Helms, 136 Ind. 131; Rogers v. Railroad, 35 Mo. 153; State ex rel. v. Vernon County, 53 Mo. 128; State v. Matthews, 14 Mo. 134; State v. Proctor, 90 Mo. 336; State v.

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Walker, 221 Mo. 515; State v. Grant, 79 Mo. 117; State ex rel. v. Willis, 66 Mo. 133; Starr v. State, 149 Ind. 594; Meagher v. Drury, 89 Ia. 372; Commonwealth v. Duff, 87 Ky. 588. (3) Such a general provision has the same effect as a saving clause in the repealing statute. R. S. 1909, secs. 8060, 8062; Lewis's Sutherland on Stat. Const. (2 Ed.), sec. 287; Treat v. Strickland, 23 Me. 236; Hine v. Pomeroy, 39 Vt. 223; State v. Boyle, 10 Kan. 116; State v. Crawford, 11 Kan. 46; McCuen v. State, 19 Ark. 635; People v. Sloan, 2 Utah, 329; McCalment v. State, 77 Ind. 250; Barton v. Gadsden, 79 Ala. 496; Grace v. Donovan, 12 Minn. 580; Mongeon v. People, 55 N. Y. 615; State v. Hardman, 16 Ind. App. 359. (4) The filing in the office of the clerk of the county court of Wayne County, of a tax-paying citizens' petition asking for an election to vote bonds, adjudication of the sufficiency thereof by the county court, the ordering of an election and giving notice thereof, holding the election, and determining the result thereof, was an act done, a right accrued, a right established and a proceeding had and commenced previous to the time of taking effect of the act repealed under which the bonds are sought to be issued, and within the meaning and provisions of Sec. 8062, R. S. 1909. State ex rel. v. County Court, 53 Mo. 128; State ex rel. v. Topeka, 68 Kan. 179; Ex parte McGee, 33 Ore. 165. (5) Article 4, Chap. 15, R. S. 1909, is not in violation of Section 12 of Article 10 of the Constitution of Missouri, because it provides for the issue of bonds payable more than twenty years after the original debt was created. State to use v. Walker, 193 Mo. 693. (a) The court must presume that a statute is constitutional, and the burden is on him who asserts its unconstitutionality to show its invalidity, beyond a reasonable doubt. Shohoney v. Railroad Co., 231 Mo. 131; State v. Webber, 214 Mo. 272; State ex rel. v. Johnson, 234 Mo. 338; State ex rel. v. Williams, 232 Mo. 56; State v. Distilling Co., 136 Mo. 219; State ex rel. v. Burton, 266 Mo. 711; State ex rel. v. Walker, 193 Mo. 693. (b) Sec. 1249, R. S. 1909, under which the refunding bonds are issued, has been held constitutional by this court in the

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only case in which its constitutionality has been attacked in the third of a century that the act has been on the statute books, and during all this time the constitutionality thereof has been recognized by the people and the lawyers of the State, and millions of dollars of refunding bonds have been issued thereunder. State ex rel. v. Walker, 193 Mo. 693.

Frank W. McAllister, Attorney-General, *Shrader P. Howell* and *John T. Gose*, Assistant Attorneys-General, for respondent.

(1) "A subsequent statute revising the whole subject matter of a former one and evidently intended as a substitute, although it contains no express words to that effect, must, on the principles of law, as well as in reason and common sense, operate to repeal the former." State v. Roller, 77 Mo. 120; Yawl v. Gillham, 187 Mo. 45; State v. Crane, 202 Mo. 80-81; State ex rel. v. Shields, 230 Mo. 102; City v. Sperry, 189 Mo. App. 483. An examination of the Laws of 1917 discloses that the law in question was repealed both by express words and by implication. Laws 1917, p. 442. Not only is the statute repealed by express words but the new act covers the entire subject-matter and shows upon its face that it was intended as a substitute for all existing law upon this subject. Laws 1917, pp. 444-477. (2) The repeal of a statute has the effect of blotting it out as completely as if it had never existed and of putting an end to all proceedings under it. Vance v. Rankin, 194 Ill. 627; 1 Lewis's Sutherland on Statutory Construction, p. 552; Sec. 478, p. 680, Endlich on Interpretation of Statutes. Only vested rights escape the effect of this rule. Any right not vested falls with the repeal of the statute on which it rests. Bishop on Written Laws, sec. 177-A; Bailey v. Mason, 4 Minn. 546; Butler v. Palmer, 1 Hill (N. Y.), 324; 1 Lewis's Sutherland on Statutory Construction, p. 546; Smith's Commentaries on Constitution Construction, p. 896. (3) To escape the effect of a repeal, the repealing act must contain a saving clause, or there must be a general statute direct-

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ed to that end. There is no saving clause in the Repealing Act of 1917. Relator must depend upon Sections 8060 and 8062, R. S. 1909, to preserve the steps taken under the old law. Said sections were not intended to preserve, and do not preserve proceedings of this character. They relate to and preserve only matters connected with and growing out of judicial matters and have no reference to proceedings outside of steps taken in actions pending. *Gordon v. State*, 4 Kan. 496; *Moorewood v. Hollister*, 6 N. Y. 319; *Fisk v. Kenne*, 35 Me. 349; *Butler v. Palmer*, 1 Hill (N. Y.), 324; *County Commissioners*, 30 Me. 222; *Erwin v. United States*, 37 Fed. 270; *People v. White*, 14 How. Prac. 501; *Hopewell v. State*, 22 Ind. App. 489; *Strom v. Montana Cent. Ry. Co.*, 81 Minn. 346. (4) The policy of this State is that municipal indebtedness should not be created to extend beyond a period of twenty years. Sec. 12, art. 10, Mo. Constitution; *Kane v. Charleston*, 161 Ill. 179. The law under which these bonds sought to be registered were refunded permits the refund bond to run for thirty years from the date of issuance, and is, in this, repugnant to the policy of the State expressed in Section 12 of Article 10 of the Constitution. Sec. 1249, R. S. 1909. The provisions of Section 1249 which permits a refunding without the submission of the question to the people is repugnant to the Constitution, which provides that no political corporation or subdivision shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose. Sec. 12, Art. 10, Mo. Constitution. (5) The refunding bonds in this case were issued to evade the law. Section 1249, if constitutional, still presupposes a bona-fide issuance of refunding bonds, and not a mere subterfuge or evasion to procure indirectly bonds which could not be issued directly. The refunding bonds in this case were issued to comply with an agreement made between the county officials and the bond purchaser, prior to the purchase of the original bonds. In

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plain language, they were issued in the furtherance of a scheme to obtain a different kind of bond from that which could be issued under the law. "In disposing of it, it must be borne in mind that the law regards substance, rather than form—the spirit and essence of a thing, rather than the mere dry letter. One may not do by indirection what he cannot do directly; or, as said by VALLIANT, J., in a case just handed down, 'If it could not be done on a straight line, it could not be done in a circle.'" Cobe v. Lovan, 193 Mo. 250; State v. Kenton, 43 Mo. 53. Moreover, the county officials had no authority to make such a contract, and both the contract and the bonds issued pursuant thereto are void.

WALKER, J.—This is a proceeding in mandamus to require the respondent as State Auditor to register an issue of two-hundred thousand dollars refunding bonds of Wayne County.

These bonds were issued under the provisions of Section 1249, Revised Statutes 1909, authorizing the funding of bonded or judgment indebtedness. The original bonds had been issued by virtue of Sections 10520 to 10525, Revised Statutes 1909, which grant the power and define the method to be pursued by the people of a county and their administrative agent, the county court, in the issuance of bonds for the improvement of public roads. One-half of the aggregate amount of this original issue was in the denomination of one-hundred dollars each and bore interest at the rate of four and one-half per cent per annum, payable annually, and to mature within twenty years after their date, subject to prior payment at any time within twenty years upon the call of the county, as provided for in Section 10522, Revised Statutes 1909. These sections were repealed by an act approved April 9, 1917 (Laws 1917, p. 442), and statutes kindred in their nature and conferring similar powers were enacted in lieu thereof. [Secs. 83, 84 and 85, Laws 1917, p. 470.]

The preliminary steps necessary to authorize the issuance of the original bonds in conformity with the

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statute then in force had been complied with prior to its repeal, but the bonds were not issued until April 29, 1917. In June, 1917, they were presented to the respondent for registration as required by Section 1275, Revised Statutes 1909, and were by him registered. Soon thereafter they were sold and paid for at their par value.

At the time of the execution and before the delivery of the original bonds to the purchaser, the county court levied a tax upon the taxable property of the county in an amount sufficient to pay the interest and a portion of the principal each year upon said bonds, in conformity with the conditions of their issuance.

Afterwards on June 10, 1917, the county court called for the payment of all of said bonds and in order to provide funds necessary to pay off and retire the same prepared and executed, under the provisions of said Section 1249, refunding bonds in the aggregate sum of two-hundred thousand dollars, each of the face value of one-thousand dollars, dated May 1, 1917, and bearing interest at the rate of four and one-fourth per cent per annum, or one-fourth of one per cent less than the interest required to be paid on the original bonds, which interest was made payable semi-annually, the bonds maturing in the year 1922 and serially thereafter to the year 1937. These refunding bonds were presented to the respondent as Auditor of the State in compliance with the requirements of the law in this behalf and their registration was by him refused. Hence this proceeding.

That the steps taken antecedent to the issue of the original bonds were in conformity with the law then in force is conceded. Respondent contends, however, that the writ should not issue for the following reasons: (1) that the statute under which the original bonds were issued was expressly repealed before such bonds were actually issued, registered and negotiated; (2) that Section 1249 under which it is sought to refund these bonds is unconstitutional; and (3), if not unconstitutional, the attempt at refunding is not within the intent and purpose of the statute and as a consequence is unauthorized.

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I. As a general rule, a statute expressly repealed is thereby abrogated and all proceedings commenced thereunder which have not been consummated are rendered nugatory unless the repealing act is modified by a saving clause. Despite the fact that the courts with that conservative spirit which looks to permanence in the law, do not favor repeals (*St. Louis v. Kellman*, 235 Mo. 687), there is except for modifications which may be effected by a saving clause but one unqualified exception to the rule as above announced and that is where a vested right is involved. Present here, this character of right may serve to solve the matter at issue. That statutes authorizing the issuance of bonds for the construction and improvement of highways are remedial in their nature seems beyond question. Although they result in the creation of a burden, they confer a benefit. The standard of civilization of a people may well be marked by the condition of their roads. Well constructed they facilitate travel, thereby encouraging a more extended intercourse which is promotive of intelligence, and at the same time facilitate trade upon which all material prosperity is based. However, the public nature and salutary character of these statutes will not alone suffice to render the rights they may confer, if not consummated, vested. By a vested right we mean one which is absolute, complete and unconditional (*Orthwein v. Insurance Co.*, 261 Mo. l. c. 665), to the exercise of which no obstacle exists and which is immediate and perfect in itself and not dependent upon a contingency. [*Young v. Jones*, 180 Ill. l. c. 221; *Bailey v. Railroad*, 4 Harr. (Del.) l. c. 400; *Day v. Madden*, 9 Colo. App. 464; *Royston v. Miller*, 76 Fed. l. c. 53.] The facts do not sustain the conclusion that such a right exists here. While a right existed which had been partly executed at the time of the repeal of the statute, it was at best inchoate or initiatory in its nature, its consummation being dependent upon the contingency of the issuance of the bonds and the registration of same. This being the nature of the right, it does not furnish authority for the exercise of the mandatory power of the court.

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Limited to this reason alone the conclusion would be justified that it was the purpose of the Legislature in the enactment of the repealing law to obliterate or destroy the power of counties to issue bonds to provide funds for road purposes; and in the absence of a saving clause to have a like drastic effect upon this power when partly exercised under the statute repealed. No special saving clause was attached to the repealing act. Except by way of emphasis to give explicit application to general laws, such special saving clause was unnecessary. A repealing statute which construed alone would paralyze partly executed powers is, under our legislative system, so modified by Sections 8060 and 8062, Revised Statutes 1909, as to perpetuate such powers to the extent of authorizing the completion or consummation of the purpose sought to be effected under a former law. Section 8060 so far as applicable to the case at bar is as follows: "nor shall any law repealing any former law, clause or provision be construed to abate, annul, or in any wise affect any proceedings had or commenced under or by virtue of the law so repealed; but the same shall be as effectual and be proceeded on to final judgment and termination, as if the repealing law had not passed, unless it be otherwise expressly provided." This court in *Rogers v. Railroad Co.*, 35 Mo. 153, discussing a question as to the modifying effect of said section upon a repealing statute, said, in effect, that this provision (Section 8060) preserves the relator's right of action notwithstanding the repeal of the statute under which the right was given. The Legislature, however, not satisfied with leaving the validity of acts done to implication, where the facts in regard to a repeal were as in the case at bar, enacted Section 8062, which provides that: "The repeal of any statutory provision shall not affect any act done or right accrued or established in any proceedings, suit or prosecution, had or commenced in any civil case previous to the time when such repeal shall take effect; but every such act, right and proceeding shall remain as valid and effectual as if the provisions so repealed had remained in force." These sections, construed together, so modify a re-

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pealing statute, as to not only render valid initiatory or preliminary acts in the exercise of a power conferred by a former statute, but authorize such subsequent acts as may be necessary to effect the purpose originally contemplated. This conclusion does not require us to travel over an untrodden field in this jurisdiction. In a mandamus proceeding against the county court of Vernon County in State ex rel. Stone v. County Court, 53 Mo. 128, the purpose of which was to compel the completion of action by a county court, which had been initiated under a statute then repealed, the Supreme Court construed and applied what are now Sections 8060 and 8062, and held that a repealing statute, although express in its terms and having no special saving clause attached, did not, on account of the modifying effect of said general saving sections, render nugatory preliminary acts done or prohibit further action in the completion of same. The limitation of the operative effect of these sections to judicial transactions as contended for by respondent, is not in accord with their terms, nor with the evident purpose of their enactment. Their general nature authorizes the conclusion that they were intended to continue in force repealed laws until proceedings commenced thereunder, regardless of their nature, might be completed. This was the construction placed upon them in the cases cited, and we have been unable to reach a contrary conclusion.

The reasoning above employed and the conclusion deduced therefrom are based upon the assumption that the repealing law left no operative statute authorizing county courts to issue bonds for road purposes and that the extension of this power in this case was due solely to the modifying effect of the general saving sections. For the reasons stated we deem the conclusion reached irrefutable; but the assumption is not in accord with the fact and is proper only to illustrate the continuing power of the former law in the absence of a like subsequent enactment. The facts are that simultaneously with the repeal of Sections 10520-10525 another statute (Secs. 83, 84, 85, Laws 1917, p. 470) was

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enacted to effect the purpose of the repealed law. The purpose to be effected and the powers conferred by these statutes were similar in all of their material features. Each was intended to authorize, upon a compliance with their conditions, the issuance of bonds by county courts for road purposes. They differ only in minor particulars. The latter differs from the former in requiring two hundred petitioners to initiate action by the county court instead of one hundred; in limiting the bond issue to ten per cent of the assessed valuation of the property of the county; in the form of ballot which is slightly changed; in the statement of the rate of interest which is omitted from the order for the election; and in authorizing the court to prescribe the terms of the bonds, instead of requiring one-half of them to be in denominations of one hundred dollars each and the payment of one-twentieth of the issue each year, the same is limited to multiples of one hundred dollars and the time of payment is left to the determination of the court, the term not to exceed twenty years. Although there was an express repeal of the former statute the immediate reenactment of same, except as to the changes noted, left, so far as the practical application of the law is concerned, the same power in the county court. Under these conditions, although the latter law does in terms repeal the former, the effect is not to be ascribed to it of annulling all proceedings commenced when the former law was in force. The operative force of both laws being essentially the same, the latter may properly be construed to be a continuance of the former; and, it is only necessary to render the steps taken regular that subsequent proceedings are required to conform to the latter. [State ex rel. v. Vernon County, *supra*.]

II. It is contended that Section 1249, Revised Statutes 1909, which authorizes the issuance of refunding bonds, is in contravention of that provision of the State Constitution (Sec. 12, art. 10) requiring the payment of county indebtedness within twenty years from the time of contracting same; and that the effect of such

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refunding is to extend the time of payment of the bonds thus issued to a period of more than twenty years from the date of the original issue. This court has held to the contrary in a well considered case of State ex rel. Proctor v. Walker, 193 Mo. 693. Without burdening this opinion with quotations therefrom, it will be sufficient to say that it marks the distinction between the original creation of a county debt and its subsequent refunding, and limits the constitutional inhibition as to time to the former. A different construction would practically prevent any other adjustment of such a debt than unconditional payment at its maturity. Drastic as are the limitations of the organic law, due to conditions existing at the time of its adoption, it would, as was clearly held in the Walker case, be too narrow and crabbed a construction to apply its provisions to the refunding of such an indebtedness as was here created. Well satisfied with the ruling in the Walker case we are not inclined to a different conclusion than is therein reached.

III. The respondent attacks the validity of the refunding bonds for the alleged reason that the county court made an agreement with the purchaser of the original bonds that he should have the right to purchase the refunding issue. This position of the respondent, however, is wholly unwarranted by either the statutory law or by reason based upon the facts.

The statute in this regard is broad and sweeping, and indicates generally the legislative intent that outstanding bonds may be refunded at any time after their issue. The language of Section 1249 is as follows:

". . . Nothing in Sections 1249 to 1251, inclusive, shall be so construed as prohibiting any county . . . that now has or may hereafter have a bonded or judgment debt . . . from funding or refunding such debt without the submission of the question to a popular vote, whenever such funding or refunding can be done at a lower rate of interest than the debts so funded or refunded bore . . ."

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Given concrete application, this language warrants the construction that Wayne County had the right to refund its road bonds whenever it could be done at a lower rate of interest, as was done in this case.

If the refunding bonds had been sold at a lower rate of interest, to any investor other than the purchaser of the original bonds, the question raised by the respondent could not have appeared in this record. Under such circumstances, it would have been the duty of the county court to accept the offer of such subsequent investor in order to secure for the county a lower rate of interest.

If the purchaser of the original bonds be denied the privilege of purchasing the refunding bonds, he is penalized for purchasing the original bonds as being the only one not entitled to purchase the refunding bonds, which would be contrary to public policy.

If the purchaser of the original bonds be denied the privilege of purchasing the refunding bonds, then the statute (Section 1249) must necessarily be construed as not applicable to county road bonds. This would result in a construction of the statute not authorized by its language or intent.

If county road bonds may not be refunded under Section 1249, in accordance with its unqualified conditions, then such bonds are stripped of one of the most important and valuable characteristics of all municipal bonds.

The foregoing alternative reasoning which in the main is that of relators, presents plausible grounds in support of the action of the county court in refunding these bonds. Under the provisions of Section 1249, however, the court is authorized at any time to take such action whenever it will effect a reduction in the rate of interest. This was accomplished by the action of the court in this case, which, in our opinion, was not only within the spirit and purpose of Section 1249, but was in conformity with its letter. There is, therefore, no merit in this contention. From all of the foregoing we are of the opinion that the peremptory writ of mandamus should issue herein, and it is so ordered.

All concur, *Bond, J.*, in paragraph 2 and result, except *Faris, J.*, who dissents.

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ALLEGIA WILLIAMS v. EDWARD B. PRYOR et al.,
Appellants.

In Banc, December 22, 1917.

1. **NEGLIGENCE: Federal Employers' Liability Act: Issues Upon Demurrer.** Since contributory negligence is not under the Federal law a bar to a recovery by an employee injured in the course of his employment while engaged in interstate commerce, a demurrer to the evidence can be sustained only on one of two theories, namely, (1) that there was no negligence on the part of defendant, or (2) that the plaintiff assumed the risk, and one or the other of these must appear as a matter of law.
2. **ASSUMPTION OF RISK: When Possible.** There can be no assumption of risk except in cases in which the relation of master and servant exists. But that relation may be by either an express or an implied contract.
3. **—: What Risks: Duty of Master.** A servant employed to do a given work assumes the ordinary and usual risks incident to such employment. But, that admitted, it still is the duty of the employer to furnish the employee a reasonably safe place in which to perform his work, and reasonably safe tools with which to perform it. Those duties are non-delegable in the sense that the master is always responsible for the faithful performance of them.
4. **—: Defective Tool: Question for Jury.** If the tool furnished by the master was not, according to plaintiff's evidence, reasonably safe for the performance of the work assigned by the master to the servant, the question of the master's negligence is one for the jury.
5. **—: —: Negligence.** The furnishing of a tool which is not reasonably safe for the performance by the servant of the work assigned to him by the master, is negligence on the part of the master, and the servant does not assume a risk growing out of the master's negligence.
6. **—: Patently Defective Tool: Continuing to Use.** If the tool furnished by the master is so patently defective that an ordinarily careful and prudent man would not use it, a use of it by the servant is negligence, but under the Federal law that negligence, being contributory, does not bar a recovery, nor does the servant assume the risk growing out of the master's negligence in furnishing such a tool.

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7. _____: Common-Law Rule: Use of Glaringly Defective Tool: Contributory Negligence. In cases in which the doctrine of assumed risk can be invoked such assumed risk must be determined by the common-law rule as that rule has been announced by the Missouri courts, and it is (1) that the servant never assumes a risk that is the outgrowth of the master's negligent act, and (2) that the servant cannot recover on the ground of his own negligence, which in Missouri is denominated contributory negligence, and the use of a glaringly defective tool would be such, but under the Federal statute such contributory negligence does not bar recovery, nor does the servant because of such contributory negligence assume the risk occasioned by the master's negligence.
8. _____: Simple-Tool Doctrine. It is negligence of the master to furnish a tool which is not reasonably safe for use by the servant in the performance of his work, whatever be the character of the tool. In its final analysis the so-called simple-tool doctrine is nothing more than that of contributory negligence, which is no defense under the Federal statute and does not fasten assumption of risk on the servant.
9. _____: More Dangerous of Two Methods. The choosing by the servant of the more dangerous of two methods of performing the work assigned to him, is contributory negligence on his part, and does not defeat his right to recover for injuries which result from the master's negligence in failing to furnish him a reasonably safe tool for the performance of his work.

Appeal from Chariton Circuit Court.—*Hon. Fred Lamb, Judge.*

AFFIRMED.

J. L. Minnis, N. S. Brown and J. A. Collet for appellants.

The court erred in overruling defendant's demurrer to the evidence, this because: First: The evidence wholly failed to show that the particular tool with which plaintiff was working was furnished by defendants, but showed on the contrary, that the tool was of plaintiff's own selection. Second: Because the evidence showed that the tool in question was so manifestly of the simple tool variety or class, that the master could not be presumed to have any superior knowledge or judgment in relation to the tool than the servant using it, and was therefore under no obligation to make an inspection of

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the tool before permitting its use. Third: Because the evidence clearly disclosed that whatever defects, if any, the clawbar in question had, they were plainly discernible to plaintiff upon the slightest inspection, and having selected this tool knowing its condition, or under such circumstances as would make him chargeable with knowledge of its condition, he assumed all the risk incident to its use. Fourth: Plaintiff's own evidence disclosed that the clawbar used by him was entirely safe for the use required of it, if used in the ordinary and safe manner, and that in using it in the manner in which he did use it, he not only recognized that that was not the safest manner, but he also recognized that under the circumstances he was in danger of experiencing the very accident and injury that befell him, and having voluntarily chosen the unsafe manner of performing the labor, he assumed all the risk incident thereto, and cannot recover. 8 Thompson on Negligence, sec. 4608; 20 Am. & Eng. Ency. Law, pp. 80 and 112; Labatt on Master and Servant, sec. 154; Randell v. Railroad, 109 U. S. 478; Kohn v. McNulta, 147 U. S. 238; Arman v. Hahn, 111 U. S. 313; Railroad v. Archibald, 170 U. S. 665; Railroad v. Horton, 233 U. S. 492; Jacobs v. Railway, 241 U. S. 229; Oil Co. v. Brown, 54 L. Ed. 939; Dickenson v. Jenkins, 144 Mo. App. 132; Courier v. Mercantile Co., 136 Mo. App. 517; Beckman v. Brew. Assn., 98 Mo. App. 555; Post v. Railway, 121 Mo. App. 562; Trainer v. Mining Co., 243 Mo. 359; Fugler v. Bothe, 117 Mo. 475; Knorpp v. Wagner, 195 Mo. 637; Holloran v. Iron & Foundry Co., 133 Mo. 470; Mathis v. Stock Yards Co., 185 Mo. 434; Steinhauser v. Spraul, 127 Mo. 541; Harris v. Railroad, 146 Mo. App. 524; Roberts v. Telephone Co., 166 Mo. 370; Lowe v. Railroad, 265 Mo. 587; Wachsmith v. Electric Train Co., 118 Mich. 275.

H. J. West and Roy W. Rucker for respondent.

(1) The trial court committed no error in modifying defendant's instruction No. 3. The second paragraph of said instruction was based on the theory that

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if the jury found that the plaintiff was using the claw-bar in a manner which was less safe than some other method then plaintiff could not recover because he assumed the risk of injury which might befall him. That instruction defined contributory negligence and not assumption of risk. *Montgomery v. Railroad*, 109 Mo. App. 94; *Hurst v. Railroad*, 163 Mo. 322; *Moore v. Railroad*, 146 Mo. 582; *Harris v. Railroad*, 250 Mo. 567; *Fish v. Railroad*, 263 Mo. 124; *Rhea v. Railroad*, 171 Mo. App. 179. (2) The mere fact that the servant chooses a dangerous way in which to do a particular thing when it might be done with less hazard in another way does not preclude recovery. *Daniels v. Goeke*, 191 Mo. App. 11-12; *Rhea v. Railroad*, 171 Mo. App. 178; *Hutchinson v. Safety Gate Co.*, 247 Mo. 116. (3) Appellant had not properly stated the doctrine of assumption of risk as the same is defined by the courts of this State. *Fish v. Railroad*, 263 Mo. 122; *Cross v. Railroad*, 191 Mo. App. 202. (4) Appellant's demurrer to the evidence was properly overruled. *Blankenship v. Paint & Glass Co.*, 154 Mo. App. 489.

GRAVES, C. J.—This case reaches this court by a proper certification of the Kansas City Court of Appeals, it being recited in the certificate of that court that one of the judges of that court deemed their opinion to be in conflict with the law as announced by this court in the case of *Fish v. Railway Co.*, 263 Mo. 106. Judge JOHNSON of the Court of Appeals fairly outlines the case in this language:

"This is an action for damages for personal injuries plaintiff alleges he sustained in consequence of negligence of defendants, his employers who, at the time, were receivers of the Wabash Railroad Company.

"Plaintiff, a laborer, was employed in the work of tearing down a bridge on the road near Ottumwa, Iowa, and was attempting to draw a bolt from a bridge cap with a clawbar when the claws slipped from their hold on the bolt, causing plaintiff, who was bearing down on the free end, to lose his balance and fall to the ground,

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a distance of twelve feet. The petition alleges 'that said clawbar was caused to slip on said bolt and the plaintiff was caused to be hurt and injured by reason of the claws on said bar having become battered and worn to such an extent that they would not take a firm hold on the bolt that was being drawn, and that because of such battered and worn condition of said claws the said clawbar was rendered dangerous and not reasonably safe for the work in which plaintiff was engaged . . . and plaintiff, without any fault or negligence whatever on his part, was unaware of the battered and worn condition of said clawbar, and did not know that the same was unsafe for use in drawing said bolt,' and the specific negligence averred is that defendants 'negligently and carelessly failed and neglected to furnish plaintiff a reasonably safe clawbar with which to work, and negligently furnished him a clawbar with which to draw said bolt that was old and battered and worn as aforesaid and unfit for the purpose for which it was provided and not reasonably safe for the work in which the plaintiff was engaged at the time he was injured,' etc.

"The defenses interposed by the answer are a general denial and pleas of assumed risk and contributory negligence. The jury returned a verdict for plaintiff for \$5,000, and after their motions for a new trial and in arrest were overruled, defendants appealed.

"The pertinent facts disclosed by the evidence of plaintiff may be stated as follows:

"Plaintiff, who was twenty-one years old and had been reared on a farm, entered the service of defendants as a common laborer in August, 1915, and worked for them until his injury in November of that year, his work being that of 'helping build steel bridges and taking down old ones.' Shortly before his injury the foreman in charge of the work of tearing down an old bridge, ordered plaintiff to draw a certain drift bolt which was about fifteen inches long and three-fourths of an inch in diameter, from the bridge cap, a timber sixteen feet long and twelve by twelve inches in its other dimensions. First, plaintiff cut out the wood from around the bolt

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with an axe, then he struck the bolt sidewise with a maul to loosen it, and then he took up the clawbar, which was one of the tools provided by defendants and, so far as the evidence discloses, the only clawbar at hand, and proceeded to draw the bolt out of the cap. The claws projected forward from the heel of the clawbar which rested on the cap and served as the fulcrum. On the first application of the power exerted by plaintiff, who stood on the cap and pressed downward on the free end of the bar, the claws pressed upward on the head of the bolt and pulled the bolt out of the wood to the limit of the action of the claws. Then plaintiff raised the free end of the lever, inching the claws down the shank of the bolt and then by twisting or turning the bar in his hands, endeavored to grasp the shank tightly between the claws, so that the next application of power would be exerted at the place where the bolt was being held in that grip. The men called this inching process 'Arkansawing the bolt,' and the evidence of plaintiff tends to show that such was the customary, as well as the most expeditious, method of pulling bolts, while the evidence of defendants is to the effect that the customary and safer method was to block up under the heel after each pulling of the bolt, so that the claws at each application of the power would press directly against the bolt head and be held thereby from slipping. Plaintiff states that in 'Arkansawing the bolt' he endeavored by turning the bar to obtain a firm hold on the shank, but that the claws had become so rounded and dulled by long usage that they could not be made to grip the shank securely, and slipped from their hold when plaintiff pressed downward on the handle, causing him to lose his balance and fall from the cap to the ground.

"Further plaintiff states that to discover the defect required the inspection of the underside of the tool, and that in obeying the order of the foreman to draw the bolt he did not pause to make such inspection, but proceeded to use the tool without any but a casual inspection of its top surface, which did not reveal the presence

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of the defect. The railroad on which plaintiff was working was engaged in interstate commerce, and the case was properly tried by both parties on the theory that the cause of action, if any, inured to plaintiff, fell within the purview of the Federal Employers' Liability Act."

The Court of Appeals held that the plaintiff assumed the risk of using a simple tool, where the condition thereof was open and obvious. If further details of the evidence become necessary they can best be given in the course of the opinion.

I. The assignment of errors in this court are: (1) refusal of a demurrer to the testimony at the close of plaintiff's case, (2) refusal of such demurrer at the close of the whole case, (3) refusal to give instruction numbered 3 as asked by defendant and in modifying same and giving it as modified, (4) refusal to give Instruction Number 7 for defendant, and (5) refusal to give Instruction Number 12 for defendant.

An examination of these assignments of error in the light of the pleadings, proof and instructions, demonstrates that the real questions are (1) was the negligence of defendant shown by the proof,
Issues for Determination. and (2) did the plaintiff assume the risk, when he did the act in the manner in which he did it, and with the tool used? Under the Federal law, contributory negligence is not a bar to recovery, but may be considered by the jury in determining the damages. So, that if defendants are right in urging their demurrer to the testimony, it must be upon one or the other grounds mentioned above, i. e. no negligence on the part of the defendants, or plaintiff assumed the risk, and that one or the other of these appears as a matter of law.

II. The subjects of assumption of risk, and contributory negligence, are often confusedly discussed in the cases. In *Fish v. Railway*, 263 Mo. 106, this
Assumption of Risk. court clarified the atmosphere to the extent of holding that there could be no assumption

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of risk, except in cases where the relation of master and servant existed, which relation might be by either an express or an implied contract. The instant case is one which falls within the class of cases in which the doctrine of assumed risk may be invoked. The real question in the case is, whether or not the things charged to the plaintiff herein, by the pleadings and proof, are things properly classed under the subject of assumed risks, or are they mere matters of contributory negligence?

We start with the rule, that where one employs another to do a given work (thus creating the relationship of master and servant) the latter (the servant) assumes the ordinary and usual risks incident to such employment. We then advance to another simple and well defined rule, that it is the duty of the employer to furnish to the employee a reasonably safe place within which to perform the work, and reasonably safe tools with which to perform it. These duties are what we denominate non-delegable duties. They rest upon the master, and if he leaves those duties to be performed by another, he is responsible for the performance. In other words, the master can never shift liability by saying that he had a competent person do these things for him. They are non-delegable duties in the sense that the master is always responsible for the faithful performance of them.

In the instant case the master furnished to the plaintiff a clawbar which, according to the evidence of the plaintiff, was not reasonably safe for the performance of the work assigned by the master to the servant. At least the jury could have found from the evidence that the tool as furnished was not reasonably safe for the performance of the work. The question then of the master's negligence was one for the jury, and the jury has found that the master was negligent. The simple-tool doctrine urged by the defendant we discuss later. What we now want to make clear is the fact that there is evidence in this record from which a jury might well find that the master was negligent in furnishing the clawbar used by the plaintiff, unless the

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simple-tool doctrine changes the situation, and this doctrine cannot change the situation, except upon two theories, i. e. (1) that there is no negligence upon the master in furnishing to the servant a simple tool, which is defective, and (2) that by the use of such defective simple tool, the servant assumed the risk. But as stated we will discuss simple tools later. What we now desire to discuss is the situation of the law, on the theory, that the furnishing of the defective clawbar was negligence upon the part of the defendant, as the jury has found.

It is the unbroken rule in Missouri, that the servant never assumes the risk, where such risk grows out of the negligence of the master. [Fish v. Railway, 263 Mo. l. c. 125. Charlton v. Railroad, 200 Mo. l. c. 433; Patrum v. Railroad, 259 Mo. l. c. 124; George v. Railroad, 225 Mo. l. c. 407.] These cases and the causes cited therein thoroughly state the rule and reasons therefor. Thus in the Charlton case, it is said: "Assumption of risks rests on contract—negligence rests in tort. [Dale v. Hill-O'Meara Construction Co., 108 Mo. App. l. c. 97.] The servant, when he enters his master's employ, impliedly agrees with him, for the compensation named, to assume the risk of usual dangers incident to the work. But the servant does not assume the risk of the master's negligence, for a very good reason, and that is because it is a fundamental proposition that it is against public policy for a master to contract against his own negligence. So, too, in the assumption of risks by a servant it is well to consider a certain assumption by the master, and that is, that the master impliedly contracts with the servant that he will exercise ordinary care to protect such servant from injury by providing a reasonably safe place for him to work. When these two assumptions are considered as proceeding hand in hand, it will be perceived that the risks assumed by the servant are those risks alone which remain after the master has exercised ordinary care."

To like effect FARIS, J., in Patrum v. Railroad, supra, said: "The moment negligence comes in at the door it may well be said that the doctrine of assumption of risk goes out at the window. [Curtis v. McNair, 173

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Mo. 270; *Brady v. Railroad*, 206 Mo. 509; *Tinkle v. Railroad*, 212 Mo. 445; *Huston v. Railroad*, 129 Mo. App. 576.] We have here in Missouri, whether logically or illogically we need not here pause to discuss, come to use the term 'assumption of risk' to express the mere hazards which appertain to a dangerous avocation when unaffected by the negligence of the master. When, however, the servant enters into or remains in the service of the master with actual or constructive knowledge of defects arising from the master's negligence and without a promise of remedy, we speak of this in our Missouri courts as contributory negligence."

Now in the instant case, if the furnishing of the worn and battered clawbar, was negligence upon the part of the master, then under the Missouri rule, so long and so firmly fixed, there is no assumption of risk in the use of such tool. If the tool was so patently defective that an ordinarily careful and prudent man would not have used it, then we have the plaintiff doing what an ordinarily careful and prudent man would not have done, having in view his own self-protection, and such use would be negligence upon his part, which negligence contributed to his injury. In other words, we would have negligence upon the part of defendant, and contributory negligence upon the part of the plaintiff. But under the Federal law, this contributory negligence does not bar a recovery, but may be only shown to reduce the damages. If therefore, the furnishing of this clawbar, in its defective condition, was negligence upon the part of the master, there is no assumption of risk in the case, and the most there is for the defendant is the alleged contributory negligence, and the demurrers to the evidence could not be sustained on that ground, under the Federal law.

III. In *Fish v. Railway*, 263 Mo. 106, we properly held that under the Federal statutes there were two classes of cases: (1) a class of cases wherein the assumption of risk could not be invoked, and (2) a class of cases wherein the defendant could invoke the doctrine of assumed risk. With this ruling we are

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fully satisfied, and the case now before us is within the latter class, above named. But in the Fish case, *supra*, we further held that as to the class of cases wherein the doctrine of assumed risk could be invoked, such assumed risk must be determined by the common law rule, and to this doctrine we now adhere. Not only so, but we say now, in plain terms, what was inferentially said in the Fish case, and that is, by the common law rule, we mean the rule of the common law, as it had been announced by the Missouri courts. That rule is that the servant never assumes a risk where such risk is the out-growth of the master's negligent act. In Missouri, the use of a glaringly defective tool may show negligence upon the part of the party so using it, but such party does not assume the risk which was created by the negligent act of the master in furnishing such tool. In such cases we hold that the plaintiff cannot recover on the ground of his own negligence, i. e. his doing a thing which an ordinarily careful and prudent man would not have done, having in view his own safety. In the Fish case, *supra*, we denominated this contributory negligence, and we still adhere to that rule. The Fish case is not the only Missouri case so to announce, but on the contrary many cases so hold. If assumption of risk grows out of the contractual relation of master and servant, as our cases hold, then there is no other place to which to give such acts of the servant, than to the field of contributory negligence. The risks he assumes are those he contracted to assume, i. e., those necessarily incident to the work. Not risks which grow out of negligence, whether such negligence comes from the one contracting party or from the other. If the neglect is that of the master, we simply denominate it negligence. If the neglect is that of the servant, and he is suing for the neglect of the master, we denominate it contributory negligence. To illustrate by the case at bar. It was the duty of the master to furnish the servant a reasonably safe clawbar with which to do the work. The failure to furnish that character of a clawbar was negligence upon the part of the master. If the defects were so glaring, and the clawbar so patently defective that an ordinarily

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prudent servant would not have used it, then its use under such circumstances was negligence upon the part of the servant, which negligence under the rule in Missouri would bar him from a recovery. But not so under the Federal statute.

IV. So that we reach this point, in this case: if we were right in the Fish case, the Court of Appeals is

Adherence to Missouri Rule. wrong in the opinion certified with the case to this court. We are not shaken from our views in the Fish case. Under the ruling of

that case, there is no assumption of risk in the case at bar, if there was negligence upon the part of the master in furnishing the kind of clawbar that was furnished. The evidence was such as to authorize the submission of the question of the master's negligence to the jury, and the jury has found the master negligent. The matter of plaintiff's contributory negligence was submitted to the jury by proper instruction under the Federal act, which permitted the jury to consider the same in reducing damages.

Whatever the rule as to assumption of risk may be in other jurisdictions, we are satisfied with the Missouri rule. We are as yet not convinced that we were wrong in the Fish case when we said that in the class of cases under the Federal statute, wherein assumption of risk could be invoked as a defense, such assumption of risk was that of the common law as interpreted by this court, in cases tried in our court. As this court interprets the common law, there can be no assumption of a risk occasioned by the negligence of the master. We find no Federal case discussing the right of this court to apply its common law rule in determining whether or not the defense of assumed risk is in a case. Until the higher court says we cannot apply the common law rule as we understand it to be, and for years have understood it to be, we shall adhere to the rule as announced in the Fish and previous cases, i. e. that the servant never assumes a risk which is the outgrowth of the master's negligence, and further that if such servant remain in a glaringly unsafe place, or use a glaringly

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defective tool, negligently furnished by the master, such servant is guilty of contributory negligence, but has not assumed the risk occasioned by the negligence of the master.

V. We now come to the simple-tool doctrine urged by the defendants. As indicated above, this so-called doctrine cannot avail the defendants, except upon one of two theories, i. e. (1) that it is not negligence upon the part of the master to furnish a tool **Simple Tool** which is not reasonably safe for the performance of the work, if such is of simple mechanism and not a complicated one, and (2) that the servant assumed the risk of using such tool.

What we have previously said practically disposes of this question. It is negligence for a master to furnish a tool which is not reasonably safe to be used on the work, and we care not what the character of the tool, in so far as the negligence of the master is concerned. Because the contract of hiring called for a reasonably safe place wherein to work, and reasonably safe tools with which to work. When we say the contract of hiring, we mean such a contract of hiring as we have before us in the present case. If the master says to the servant, I have a certain work to do, and here are the tools you must use, and the servant accepts the employment, we might have a different case, but that is not this case, nor do we say we would have a different case, because the contracting against his own negligence might be a factor. However, we had better adhere to the case here.

Going back to the so called simple-tool doctrine, what is there to be found in it? In its last analysis it is nothing more than that of contributory negligence. A servant picks up a hoe, an axe, or a clawbar, and if the defects are open and glaring, and so open and glaring that a reasonably prudent person would not undertake to use them in the work being done, then the use of the tool would not be the exercise of ordinary care upon his part for his own protection. This failure to use ordinary

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care is negligence, and if he sues the master for the master's neglect in furnishing an unsafe tool, the master may respond and say the tool was a simple device, and any ordinary person could have seen and known the defects thereof, and in using it in that condition you have been guilty of negligence which contributed to your injury, and you cannot recover. To my mind that is all there is in the so-called simple-tool doctrine in states like Missouri, where we have fixed views upon assumed risk. You can show the simple character of the tool, and the obviousness of the defects, to show contributory negligence.

VI. What we have said practically disposes of another contention made, i. e., that the servant having chosen the more dangerous of two methods of doing work, as-

sumed the risk incident to the method chosen.

Choosing Dangerous Method. Here again the courts of this State denominate this act contributory negligence and not assumption of risk. [Montgomery v. Railroad, 109 Mo. App. l. c. 94; Moore v. Railway, 146 Mo. l. c. 582.]

In the Moore case, *supra*, WILLIAMS, J., quotes with approval the following from Bailey on Personal Injuries Relating to Master and Servant, volume 1, section 1123: "Where a person having a choice of two ways, one of which is perfectly safe and the other of which is subject to risks and dangers, voluntarily chooses the latter and is injured, he is guilty of contributory negligence and cannot recover."

And this is sound, in my judgment. If a servant choose the more dangerous of two ways open to him, he is failing to do (for his own protection) that which an ordinarily careful and prudent person would do. Such failure is negligence on his part, and where such negligence is invoked as a defense by the defendant in a law suit, the law denominates it contributory negligence.

VII. As indicated, the rule announced in the Court of Appeals contravenes the rule in the Fish and other

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cases from this court. It held that the plaintiff was barred because he had assumed the Conclusion. risk. To this we do not agree. Whilst the defendant has made five assignments of error, set forth above, they all raise the questions which we have discussed, and raise none other. In our judgment this case was well tried by the court *nisi*, and its judgment should be affirmed. It is so ordered. All concur.

THE STATE ex rel. BUFFUM TELEPHONE COMPANY v. PUBLIC SERVICE COMMISSION,
Appellant.

In Banc, December 22, 1917.

1. **PUBLIC UTILITY: Service for Members Alone.** A voluntary association of farmers, which constructs telephone lines and owns the 'phones, not operated for hire, but for the personal convenience of the members, with no other expenses than the necessary cost of connecting the lines at the switchboard, in a town in which they center, with the lines of other like associations, is not a public utility; and since its use and operation do not affect the interests of the general public, the Public Service Commission has no power under the statute to compel the making of a physical connection between its lines and those of a public telephone corporation. The regulative authority of the Commission is confined to such companies as "conduct telephonic communications for hire."
2. _____: _____: **Service to Non-Subscribers.** Nor did the fact that the association charged a flat rate to a few non-members, who constructed their own lines and maintained their own 'phones, and thereupon were entitled to connect with the lines of members and to use the facilities of the association without further charge, convert the association, the use of the lines of which was otherwise confined to members alone, into a public utility; for its constitution and by-laws conferred upon it no such authority as it thus exercised.
3. _____: **Power of Supervision: Public Rights.** To authorize supervision by the Public Service Commission, the exercise by the utility of its powers must be such as will affect public interest rather than private rights.

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4. EXTENT OF REVIEW: Questions Not Raised Before Commission.

A constitutional question injected into a case for the first time on review in the circuit court, namely, that the order of the Public Service Commission requiring the defendant to connect its telephone lines with the lines of a voluntary association, not a public utility, is a taking of property without just compensation and without due process of law, cannot be considered by the court, because not timely raised.

5. PRIVATE TELEPHONE ASSOCIATION: Connection With Public Utility: Public Necessity. Numbers will not establish a claim of public necessity. That a large number of persons are being served by telephone lines, constructed for their own convenience and confined to their private use, does not entitle them, individually or collectively, on the ground of public necessity, to an order from the Public Service Commission compelling a public utility in their midst to make a physical connection between their line and its own.

Appeal from Cole Circuit Court.—*Hon. J. G. Slate, Judge.*

AFFIRMED.

A. Z. Patterson and James D. Lindsay for appellant.

(1) The enforcement of physical connection and interchange service between carriers, railroad companies, telegraph companies, telephone companies, or between such a company and customers, under reasonable conditions, through switches, spur tracks, or connecting wires, is an exercise of the power of regulation, and not an act to be accomplished only through an exercise of the right of eminent domain. In the instant case, the order of the Public Service Commission requiring the Buffum Telephone Company, at the expense of the Auxvasse Mutual Telephone Company, to construct and maintain a physical connection with the latter company, and to receive and transmit messages or conversations for long distance transmission originating on the lines of the Auxvasse Company, is valid as a reasonable regulation of the business of respondent and its use of its property—is a requirement of service—and is not a

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"taking" or appropriation of respondent's property. Sections 2, 16, 86, 87, 90, 93, Public Service Commission Act; *Railway v. Michigan Ry. Comm.*, 231 U. S. 457, 468; *Railroad v. Railroad Comm.*, 236 U. S. 615; *Jacobson v. Wisconsin Comm.*, 179 U. S. 287; *Railroad v. Iowa*, 233 U. S. 334; *Railroad v. Corporation Comm.*, 206 U. S. 1; *Washington ex rel. v. Fairchild*, 224 U. S. 510; *Tel. & Tel. Co. v. Hotel Co.*, 214 Fed. 666; *Telephone Co. v. Railroad Comm.*, 162 Wis. 383; *Telephone Co. v. Railroad Comm.*, 161 N. W. 240; *Telephone Co. v. Telephone Co.*, 96 Neb. 260; *Tel. & Tel. Co. v. State*, 38 Okla. 554; *State ex rel. v. Tel. & Tel. Co.*, 147 Pac. 885. The Buffum Telephone Company is a common carrier of spoken messages, and its duties in that regard must be tested by the rules which the courts have laid down as appropriate and necessary in determining the obligations assumed by common carriers. *Telephone Co. v. Telephone Co.*, 236 Mo. 114; *Telegraph Co. v. Tel. & Tel. Co.*, 177 Fed. 726; *Telegraph Co. v. Tel. & Tel. Co.*, 61 Vt. 241; *State ex rel. v. Telephone Co.*, 17 Neb. 126. (2) The Auxvasse Mutual Telephone Company is a public utility and is subject to the jurisdiction of the Public Service Commission, because it is engaged "in the conduct of the business of affording telephonic communication for hire." It does this in collecting tolls from non-members who use any part of its system of lines for telephonic communication, or in collecting five dollars per annum from all of those subscribers who are non-members. Subdiv. 17, Sec. 2, Public Service Act 1913; Sections 86 and 87 and Subdivision 3 of Section 93, Publ. Serv. Act 1913; *Tel. & Tel. Co. v. State*, 144 Pac. 1060, 1062; 21 Cyc. 437. The Legislature used the word "hire" designedly as distinguished in meaning from the word "profit." *Carter v. Arnold*, 134 Mo. 208. Contemporary history and the words employed in the definition of the term "telephone corporation," show that the definition cannot be so narrow as to include only corporations operating for profit and with dividends as the object in view. *Land & Impr. Co. v. Kansas City*, 172 Mo. 533. (3) It is not the amount but the character of the business done which constitutes a public utility. It need not be unrestricted-

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ly offered or open^s to all of the public. *Taxicab Co. v. Kutz*, 241 U. S. 252; *Public Utilities Comm. ex rel. v. Noble*, 113 N. E. 910; *Public Utilities Comm. ex rel. v. Telephone Co.*, 268 Ill. 411; *Public Service Comm. v. Fox*, 160 N. Y. Supp. 59; *Van Dyke v. Geary*, 37 Sup. Ct. Rep. 483; *Water, Light & Power Co. v. Eshleman*, 167 Cal. 681; *Tel. & Tel. Co. v. Hotel Co.*, 214 Fed. 666. (4) The Auxvasse Company is subject to the orders and jurisdiction of the Public Service Commission, not only by the evidential facts in the record showing it to be a company "affording telephonic communication for hire," but also by virtue of its complaint and its express submission of itself and its business to the Commission, for regulation, in those express terms. *Tel. & Tel. Co. v. State*, 144 Pac. 1060. (5) But the power of the Public Service Commission to require the Buffum Telephone Company to provide instrumentalities and facilities adequate and in all respects just and reasonable with respect to its business of affording long distance telephone service, is plenary, and this power does not depend for its existence or exercise upon the complainant or applicant for the service, being technically and unrestrictedly a public service company. But it is enough that the business afforded and the service attempted by the complainant affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so. Secs. 86 and 87, Public Service Commission Act; Subdivisions 6 and 9 of Section 16, *Ibid.*; *Taxicab Co. v. Kutz*, 241 U. S. 252; *Public Service Comm. v. Fox*, 160 N. Y. Supp. 59; *Tel. & Tel. Co. v. Hotel Co.*, 214 Fed. 666; *Van Dyke v. Geary*, 37 Sup. Ct. Rep. 483; *Water, Light & Power Co. v. Eshleman*, 167 Cal. 681; *Public Utilities Comm. ex rel. v. Telephone Co.*, 268 Ill. 411; *Ins. Co. v. Lewis*, 233 U. S. 389; *Ratcliffe v. Stock Yards Co.*, 86 Pac. 150; *Peck v. Tribune Co.*, 214 U. S. 190. (6) The constitutional issues attempted to be injected into the case through plaintiff's motion for judgment in the circuit court, came too late. They were not raised in the application for rehearing filed with the Public Service Commission, and plaintiff cannot urge them now.

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Such issues must be raised in time, and in due course of orderly procedure. Section 110, Public Service Commission Act; State ex rel. v. Atkinson, 192 S. W. 86; Sheets v. Insurance Co., 226 Mo. 612; Hattzler v. Met. St. Ry. Co., 218 Mo. 562.

Jeffries & Corum and *E. H. Painter* for respondent;
D. A. Frank, of counsel.

(1) The commission did not have jurisdiction or authority to order a physical connection between the two telephone lines. Subdiv. 17, sec. 1, and art. 5, Public Service Act, Laws 1913; Tel. Co. v. Light & Tel. Co., 236 Mo. 114; Public Utilities Comm. ex rel. v. Mutual Tel. Assn., 270 Ill. 183; State ex rel. v. Public Service Comm., 192 S. W. (Mo.) 958; State v. Tie & Timber Co., 181 Mo. 558. (2) The physical connection ordered is unauthorized under the statute, and confiscatory, because: (a) No public convenience or necessity will be subserved thereby. Subdiv. 3, sec. 93, Public Service Act, Laws 1913; Atchison Railroad v. Public Serv. Comm., 192 S. W. (Mo.) 460; Tel. Co. v. Tel. Co., 37 Ga. Com. Leaflet, 143; State of Washington ex rel. v. Fairchild, 224 U. S. 510; People ex rel. v. Tel. Co., 58 N. Y. Supp. 221; Mo. Pac. Ry. Co. v. Nebraska, 164 U. S. 403; In re Petition of Phil., M. & S. Railroad, 203 Pa. 354. (b) The purpose is "primarily to secure the transmission of local messages or conversations between points within the same city or town." Subdiv. 3, sec. 93, Public Service Act, Laws 1913; Tel. & Tel. Co. v. Eshelman, 137 Pac. 1119. (3) The physical connection prayed for would operate as the taking of the property of the Buffum Company without a judicial determination that the taking is for a public use, and without due process of law, in violation of the provisions of Fourteenth Amendment to Constitution of the United States, and Sections 10, 20 and 30 of Article 2 and Section 4 of Article 12 of Constitution of Missouri. State ex rel. v. Publ. Serv. Comm., 194 S. W. 287; Tel. & Tel. Co. v. Railroad, 202 Mo. 656; Pumpelly v. Greenbay Co., 13 Wall. 166; State ex rel. v. Associated Press, 159 Mo.

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410; Tel. Co. v. Light & Tel. Co., 236 Mo. 114; Tel. & Tel. Co. v. Eshelman, 137 Pac. 1119; Railway Co. v. Nebraska, 164 U. S. 403; Cape Girardeau v. Houck, 129 Mo. 607; Shoemaker v. United States, 147 U. S. 282. (4) The Public Service Commission is not a judicial body, and has no authority to pass upon constitutional questions, and no legislative enactment can give it such authority. Railroad v. Publ. Serv. Com., 192 S. W. 460; State ex rel. v. Publ. Serv. Com., 192 S. W. 958; State ex rel. v. Locks, 266 Mo. 314; State ex rel. v. Andrae, 216 Mo. 617; Railroad v. Coal Co., 162 Mo. 288; Aldridge v. Speers, 101 Mo. 460; Kansas City v. Baird, 98 Mo. 215.

WALKER, J.—This is an appeal by the Public Service Commission from a judgment of the circuit court of Cole County, setting aside an order of the Commission, which required that a physical connection be made at the town of Auxvasse in Callaway County between the Auxvasse Mutual Telephone Company and the Buffum Telephone Company.

The proceedings before the Commission were upon the complaint of the Auxvasse Company asking that the Buffum Company be required to receive and transmit long distance messages over its lines from the members and subscribers of the Auxvasse Company, that they might thereby have long distance connection over the lines of the Buffum Company.

The Auxvasse Company is not incorporated, but is a mutual telephone company formed by the union at the town of Auxvasse of various neighborhood lines extending into the town and united in a local exchange. It was organized in 1911, to afford cheap telephone service to its shareholders and subscribers. It consists of about one hundred and forty members owning twelve or more lines running into and connected at a central office and switchboard in the town of Auxvasse. The members on the various lines composing the system, furnish and own their respective lines and instruments and keep the same in repair, and the members on each line maintain an

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organization of their own. The union of the various lines under a constitution and by-laws constitutes the central organization known as the Auxvasse Mutual Telephone Company. The organization owns the poles, wires and equipment in the town of Auxvasse, and the central office and switchboard whereby all the various lines are united and a local exchange maintained. The maintenance of the central office, and of the upkeep of the property belonging thereto, is borne by receipts for service rendered to certain subscribers at flat rates, who are non-members, and from toll charges received from non-members talking from 'phones on the lines of the company to a person on the line of another mutual local company with which the Auxvasse Company maintains free exchange service arrangements.

Any deficit is made up by assessment upon the members. There are eight subscribers not members who pay a flat rate or fee of five dollars each per annum for service on the exchange and for communications over the various local lines of the company.

Any white person may talk free from the 'phone of a member to a person at a 'phone on any of the lines of the company, and may talk with a person on the line of any of the other like mutual local companies with which the Auxvasse Company has exchange service arrangements upon payment of a toll charge of ten cents.

The members and subscribers on the various lines receive free service over the lines of the company and over the lines of other like mutual companies with which exchange service arrangements have been made. There are about twenty-five of the latter.

The members and subscribers of the Auxvasse Company also have service over a mutual line owned by the company, to Mexico, Missouri, but do not have general long distance service. The service of the members and subscribers is confined to the lines of the company, the connecting line owned by the members to Mexico, and the lines of other like mutual companies with which free service arrangements have been established.

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The Buffum Company is an incorporated company, and has a local exchange in the town of Auxvasse, and through its own lines, and connecting lines of other companies with which it is affiliated, has long distance service over the country in general. The central offices of the Buffum Company, and of the Auxvasse Company, are located in the same block near each other.

This action is prompted by a desire of the members of the Auxvasse Company to have from their own 'phones long distance connection through the Buffum Exchange with the various lines and points reached by the Buffum Company. Connection with Fulton, the county seat of Callaway County, is especially desired.

The Commission found that the cost of the physical connection between the two exchanges would not exceed \$25; and that the connection desired was not for an interchange of messages between the local exchanges of the two companies, but that messages transmitted by the subscribers of the Auxvasse Company over its lines should be received and transmitted by the Buffum Company over its lines. The Commission further found that the matter was within the provisions of the Public Service Act; that the physical connection desired could reasonably be made and that there would thereby be formed a continuous line of communication between the two companies for the transfer of messages or conversations by persons entitled to use the lines of the Auxvasse Company; that public convenience and necessity would thereby be subserved; whereupon the Commission ordered the connection to be made and that the service asked be furnished by the Buffum Company.

The Commission also found that irrespective of whether the property of the Auxvasse Company was impressed with a public use or not, the nature of its business and the number of persons served by it were such as to create a necessity for the physical connection demanded, and therefore the making of same and the rendering of the service was a duty which could lawfully be required of the Buffum Company.

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It was ordered that the expense of making the connection be borne by the Auxvasse Company, and that said company, or its subscribers, or any person using its line for the purpose of long distance connection with the lines of the Buffum Company, pay to the latter company for such service, the full amount of the tolls and charges of the Buffum Company therefor, in accordance with its schedule filed with the Commission.

The Buffum Company filed its application for a rehearing, but failed to allege as grounds for same the violations by the Commission through its order of provisions of the Constitution of Missouri and of the United States, as subsequently set forth in its petition for review. Upon the overruling of the application for a rehearing, the Buffum Company filed its petition for a review in the Cole County Circuit Court of the action of the Commission, setting up the constitutional questions above noted. In the circuit court the respondent herein asked that a jury be called and that it be permitted to introduce additional testimony. These requests were refused.

Respondent then filed its motion for a judgment reversing the order of the Commission, and among other things set up that the order was made without due process of law, and was a taking of respondent's property without just compensation, and was a violation of Sections 10, 20, 21 and 30 of Article 2 of the Constitution of Missouri, and of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and that the alleged taking of its property was an unauthorized exercise of the right of eminent domain.

The appellant, Public Service Commission, filed its motion to strike out respondent's motion for a judgment, for the reason that same was based upon grounds not urged or relied upon by respondent in its motion for rehearing, and was a violation of the method of procedure provided for by the Public Service Act, under the law of its creation, which motion was overruled. The court thereupon sustained respondent's motion, and entered judgment annulling and setting aside the order of the Commission.

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The judgment of the circuit court, sustaining the respondent's motion, involves a finding that, upon the record, the Auxvasse Company was not a public utility operating for hire, and therefore not subject to the jurisdiction of the Commission; that public convenience and necessity would not be subserved by the making of the connection, and that no authority existed for the order, and that enforcement of same constituted a taking of respondent's property in the sense and manner forbidden by the Constitution.

A synopsis of the relevant sections of the Public Service Act (Laws 1913, pp. 556-651) will assist in determining the matter at issue. By a telephone corporation as the term is employed in the act is meant "every corporation, company, association, joint stock company or association, partnership and person, . . . owning, operating, controlling or managing any telephone line or part of telephone line used in the conduct of the business of affording telephonic communication for hire." [Sub-div. 17, sec. 2.]

The term telephone line is defined to include every sort of property, "used, operated, controlled or owned by any telephone corporation to facilitate the business of affording telephonic communication." [Sub-div. 18, sec. 2.]

The jurisdiction, supervision, powers and duties of the Commission are declared to extend: "to all telephone lines, as above defined. . . . and to every telephone company, . . . so far as said telephone . . . lines are and lie, and so far as said telephone companies . . . conduct such line or lines, respectively, within this State." [Sub-div. 6, sec. 16.]

The subjection of telephone corporations to the supervision of the Commission in respect of facilities and service it shall afford, is stated thus: "Every . . . telephone corporation shall furnish and provide with respect to its business such instrumentalities and facilities as shall be adequate and in all respects just and reasonable." [Sec. 87, Sub-div. 1.]

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The duty of each telephone corporation to transmit messages is thus prescribed: "Every . . . telephone corporation operating in this State shall receive, transmit and deliver, without discrimination or delay, the conversations and messages of every other . . . telephone corporation with whose line a physical connection may have been made." [Sub-div. 5, sec. 87.]

The provision for requiring physical connections between lines of telephone companies, is as follows: "Whenever the commission . . . shall find that a physical connection can reasonably be made between the lines of two or more telephone corporations . . . whose lines can be made to form a continuous line of communication by the construction and maintenance of suitable connections for the transfer of . . . conversations, and that public convenience and necessity will be subserved thereby, or shall find that two or more . . . telephone corporations have failed to establish joint rates, tolls or charges for service by or over their said lines, and that joint rates, tolls, or charges ought to be established, the commission may, by its order, require that such connection be made, except where the purpose of such connection is primarily to secure the transmission of local . . . conversations between points within the same city or town, and the conversation be transmitted . . . over such connection under such rules and regulations as the commission may establish, and prescribe through lines and joint rates, tolls and charges to be made, and to be used, observed and in force in the future. If such . . . telephone corporations do not agree upon the division between them of the cost of such physical connection or connections or the division of the joint rates, tolls or charges established by the commission over such through lines, the commission shall have authority, after further hearing, to establish such division by supplemental order." [Sub-div. 3, sec. 93.]

The powers of the Commission, in requiring improvements, changes in or additions to telephone facili-

ties are thus further amplified and emphasized: "Whenever the commission shall be of the opinion . . . that repairs or improvements to or changes in any . . . telephone line ought reasonably to be made, or that any additions should reasonably be made thereto, in order to promote the convenience of the public or employees, or in order to secure adequate service or facilities for . . . telephonic communications, the commission shall make and serve an order, directing that such repairs, improvements changes or additions be made within a reasonable time and in a manner to be specified therein, and every . . . telephone corporation is hereby required and directed to make all repairs, improvements, changes and additions required of it by any order of the commission served upon it." [Sec. 95.]

All of these provisions are to be liberally construed as required by the act, towit: "The provisions of this act shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities." [Sec. 127.]

I. If the companies here involved are public utilities within the meaning of the Public Service Act and a physical connection between them will add to their efficiency as such, then the judgment of the circuit court should be reversed and the order of the Commission affirmed, otherwise not. If it were not conceded by the Buffum Company that it is a public utility and as such subject to the supervision of the Commission, the nature of its organization and the character of its activities would justify no other conclusion. It remains, therefore, to be determined whether the Auxvasse Company is subject to a like classification. To render it so, it is not necessary that it be incorporated. Under the inclusive provisions of subdivision 17 of section 2, supra, any association, joint stock company, partnership or person, dependent primarily upon the character of the telephone business they conduct, may be so classified.

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The Auxvasse Company is a voluntary association. The right to the use of the facilities it affords is limited to white persons who are the owners of certificates of shares therein, for which they are required to pay a fixed sum. In addition an assessment is made upon such shareholders of \$1.50 each per quarter to maintain and operate a central office or switchboard. Maintenance charges required of each shareholder may be fixed quarterly. Shareholders are not required to pay more than is actually necessary for the upkeep and operating expenses for the quarter ensuing the fixing of same. Non-subscribers are not charged for talking from any telephone on the Auxvasse switchboard to any other telephone on the same switchboard; but when talking from a telephone on the Auxvasse switchboard to one on a connecting switchboard they are required to pay a fee of ten cents to the owner of the telephone where the call is made. Fees thus collected are required to be paid into the company's treasury during the quarter when they were collected. This constitutes the extent of the business and income of the Auxvasse Company, except five dollars per year paid by each of eight flat rate subscribers who are thus entitled to the facilities afforded without further charge. An abstract of the testimony of a number of the shareholders of this company given at the hearing before the Commission will give a definite idea as to the character of the business of the company from which its nature and purpose may be determined. These are literal excerpts from different witnesses' testimony in response to inquiries propounded to them on the stand:

"To maintain and operate the central office each party contributes \$1.50 per quarter."—E. W. Martin.

"The lines are kept up by the members, who own them. This keeping up of the lines applies to residents in the town of Auxvasse and the surrounding country."—S. W. Turner.

"It was never the intention of the company to go into the telephone business for profit. No, I don't think they calculated on more than enough to make ex-

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penses. It was not the intention to go into what is known as a commercial business. The lines were built for convenience. That's what a telephone is for."—J. F. Buckner.

"The company is not in the telephone business to make money out of it. It was simply for the accommodation of the shareholders. The Mexico toll line is kept up out of the treasury of the company. I use it three or four times a day, I reckon, but I pay no toll charges for this use. The toll line is used a whole lot. Country people when they come in use it more than we do in town. We keep it up for the benefit of those who want to use it."—W. F. Woodson.

"On the Auxvasse line each individual owns the box he uses, and the association owns the telephone line reaching to the switchboard. The association does not build lines to anybody. It is simply a collection of individuals divided further into lines and each line is a separate organization in that it owns its own line. The Auxvasse Company is not a corporation; it is simply a voluntary association composed of individuals. Its purpose is to provide telephone service to its stockholders at actual cost. No service is furnished in town to anybody except stockholders."—S. M. Turner.

The constitution and by-laws and the oral testimony all point to the conclusion that the Auxvasse Company is primarily a private organization not operated for hire. Operation for hire is a prerequisite to supervision by the Commission. The reason is plain. The Commission was created, as is evident from the entire statute defining its powers, not to interfere with individual action except where same assumes a public nature, but to provide regulations and give plenary power as defined by the statute to the Commission to control such utilities as from their nature and operations may affect the interests of the general public. All such organizations are commercial in their nature in that they are not conducted for favors, but for fees. Recognizing this fact, the framers of the Public Service Act made this a condition precedent to Commission control. That a fee may be exacted from non-subscribers for

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talking from a telephone on the company's switch-board to one on a connecting line does not militate against the correctness of the conclusion that this company does not afford telephonic communications for hire. If thus conducted, the right of non-subscribers to demand service would be absolute upon the tender of the fee. Such a right cannot exist, however, because the telephones are individually owned by those in whose premises they are located and no limitation as to such ownership having been made by the company, if such could be made under the circumstances, the right of use to non-subscribers is at best permissive and being so does not authorize the conclusion that the company is conducted for hire. The fee thus authorized to be charged is but an incident in the general conduct of the business of the company, and is not indicative of its character, which is to serve those who sustain it and not the general public. Nor is the claim that the eight subscribers, who in the absence of any authority therefor in the company's constitution and by-laws, are permitted upon the payment of a flat rate, free from assessments, to enjoy its facilities, an argument in favor of the contention that the company is conducting its business for hire. Each of these subscribers owns the 'phone used by him; except therefore for the difference between the payments made by them and others they sustain no different relation to the company. If their relation be construed to give color to the contention that these transactions are of a commercial nature and hence the company is conducting its business for hire, it will be sufficient to say that the constitution and by-laws based thereon confer no such authority upon the company as is thus exercised. The elementary axiom is therefore applicable that the company cannot enlarge its character by exceeding its powers.

The settlement of a controverted question is often rendered easier by a resort to elementals. To that end, what is meant by such companies as "conduct telephonic communications for hire?" Simply those which engage in business as a commercial transaction, or for profit.

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Summarizing what we have heretofore said, is this company of that class? It lets nothing; it hires nothing; but for the maintenance of its own property, and for that alone, it exacts a like sum quarterly from all of its members. The accessories, to-wit, the telephone boxes necessary to render the lines available for the transmission of conversations, do not belong to the company, but to the individual members. Hence, the property owned by the company is but inconsiderable and there is in existence no such organization as is contemplated by the statute.

The Public Service Act is further illuminative of the character of telephone companies subject to its provisions, in defining the requirements that may be made of them: The Commission may require them to furnish and provide such instrumentalities as shall be adequate in all respects for the transacting of their business (Sec. 87); to transmit and deliver without discrimination or delay conversations sent over other lines with which they have physical connection (Sub-div. 5, Sec. 87); to make physical connections with other like companies (Sub-div. 3, Sec. 93); to order repairs, improvements and changes in companies for the betterment of the service (Sec. 95). In addition they may be required to file schedules of their rates of charges with the Commission and subject themselves to its supervision by complying with its rules and regulations for the operation of telephone companies. There is no pretense that in any of these particulars this company has complied with these statutes. On the contrary, it is not contended that it could be required so to do. Unless there is other evidence than is disclosed by the record, we are inclined to the opinion that it could not be so required. Rulings upon kindred questions in other jurisdictions are but a little more than persuasive in the determination of the matter here at issue on account of differences in the statutes construed. Rightly reasoned this well marked line runs through them all that to authorize supervision the character of the utility must be of such a nature that the exercise of its powers will affect public rather than

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private rights. Any other classification would destroy the ruling purpose underlying the creation of public service commissions, and necessarily, sooner or later, run afoul of constitutional provisions, the violation of which would be inimical to individual liberty of action.

II. The same facts adduced to show that the Auxvasse Company is not a public utility will sustain the conclusion that its connection with the Buffum Company is not such a matter of public necessity and convenience as to authorize the issuance of ^{Power of} ~~Commission~~ an order in regard thereto. Recapitulated these are: the nature of its business, existing as it does not for public use but private convenience; its requiring no pay for profit but fees only for the purpose of existence. Need arguments be piled up like Pelion on Ossa to establish the fact that facilities added by the Commission's order to an association of this type, will enable it to pass beyond its own tether and add even incidentally to the convenience of others than its own membership? We think not.

III. The constitutional question injected into this controversy for the first time in the petition for review was not timely. How, without a contradiction in terms, can a matter be reviewed which has not been viewed? The purpose of the petition filed in the circuit court, in cases of this character, would be defeated if new issues were permitted to be incorporated therein. Forms of procedure are for the purpose of facilitating business whether it be of a court or a commission; and there is no more reason why, when required by law, they should not be observed in one case than in the other. By the express language of Section 110 of the Public Service Act (Laws 1913, p. 641) it is provided that "no corporation or person or public utility shall in any court urge or rely on any ground not set forth in said application," referring to that of rehearing. We ruled in State ex rel. v. Atkinson, 269 Mo. 634, that the observance of this rule was obligatory. There is no reason for a variance from this conclusion. Neither within the letter nor

**Questions
Un' imely
Raised.**

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spirit of the Public Service Act is the character of the Auxvasse Company such as to render it subject to the Commission and hence the latter is not authorized to comply with the demand herein made.

IV. The contention is vaguely made by appellant that the individual members of this company have, collectively, the right to demand the connection here under consideration. This contention is evidently based upon the assumption that numbers alone will establish the claim of public necessity. This is not true. Their mere numbers give them no more rights in the premises than a single individual would have under like circumstances. If A should demand that his private 'phone be connected with the Buffum Company, we may look in vain for authority in reason or the law for the exercise of such power by the Commission as will effect a compliance with this request. Granted to A, the right must, as a necessary consequence, be conceded to every other individual owning a private telephone line. The result would be the improper invasion of the rights granted by law to the Buffum Company or, in other words, the taking of its property without due process of law. A, therefore, is entitled to the same service as others but not more, and he will only be heard to complain when such service is denied. This subject was discussed incidentally with much clearness in Home Tel. Co. v. Sarcoxie L. & Tel. Co., 236 Mo. l. c. 133, in which the conclusion we have indicated was reached.

There is, in our opinion, no sufficient ground for the order of the Commission requiring a connection to be made between the Buffum and the Auxvasse companies, and the judgment of the circuit court is therefore affirmed. It is so ordered.

All concur, except *Blair, J.*, who dissents.

THE STATE ex rel. ST. JOSEPH RAILWAY, LIGHT & POWER COMPANY v. PUBLIC SERVICE COMMISSION et al., Appellants.

In Banc, December 22, 1917.

1. **PUBLIC SERVICE COMMISSION: Alteration of Grade Crossings:** Delegation of Legislative Power. It was entirely competent for the Legislature to delegate to the Public Service Commission composed of trained experts exclusive power to require the installation, alteration or removal of the crossings of highways by railroads and street railways, and a separation of grades at such crossings, and to prescribe the terms upon which such separations are to be made and the proportions in which the expense shall be divided among the railroad and street railway corporations affected, or between them and the State, county or municipality or other public authority in interest, as it has done.
2. _____: _____: _____: Modifications of Common Law. The statute giving to the Public Service Commission "exclusive power" to charge the costs and expenses of the elimination of a street grade-crossing and the restoration of the highway against the street railway or steam railroads affected, or to apportion them among other parties interested, and making it its duty to apportion such costs among such corporations and "the State, county, municipality or other public authority," is but a modification by positive law of the common law, by expanding the principles of the common law so as to fit the conditions arising in social and industrial evolution and to apply them to a fuller and more enlightened justice than was afforded under the narrower enunciations of that law at a time when there were fewer diversities of interest to be affected by the removal of railroad street crossings.
3. _____: _____: Reasonable Apportionment of Costs: According to Trackage. Where the Public Service Commission found the total cost of the removal of dangerous street-level crossings and the restoration of the highways, and subtracted therefrom the estimated consequential damages to private property and apportioned that deduction to the city, and of the balance of \$238,000 apportioned \$203,431 to the steam railroads and \$34,569 to the street railway, using the "trackage basis" plan in making the allotment, principally but not solely, but taking into consideration certain other elements of constructive cost and benefit of the general improvement, and its finding is sustained by the clear preponderance of the relevant testimony as to the proper method of making the apportionments, they will not be held to be unreasonable or un-

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just, although the street railway company contended throughout that it should be required to pay only the estimated cost of the work to be done within its track zone, which would be materially less than its allotment.

4. ———: **Reasonableness of Order: Determined Upon Equitable Principles.** The reasonableness and justice of an order of the Public Service Commission will be determined by the court upon a review of all the evidence as in a trial of a suit in equity.

Held, by BLAIR, J., dissenting, with whom WILLIAMS, J., concurs, that, for the reasons stated in State ex rel. Wabash R. Co. v. Publ. Serv. Com., 271 Mo. 155, the court in cases like this does not weigh the evidence as in suits in equity.

Appeal from Cole Circuit Court.—*Hon. J. G. Stake*, Judge.

REVERSED AND REMANDED.

Alex. Z. Patterson and James D. Lindsay for appellants.

(1) Section 50 of the Public Service Commission Law (Laws 1913, p. 589) provides that the expense of grade crossing elimination shall be by the Public Service Commission "divided between the railroad or street railroad corporations affected, or between such corporations and the State, county, municipality or other public authority in interest." Acting under the authority of this statute, the Public Service Commission lawfully apportioned a reasonable part of the expense of the grade-crossing improvements to the Street Railway Company, and the circuit court should have affirmed such order of apportionment. 33 Cyc. 290; Milwaukee v. Railroad, 9 Wis. R. C. R. 93, 1915 B. P. U. R. 155; Polk v. Railroad Comm., 154 Wis. 523; Woodruff v. Catlin, 54 Conn. 277; Railroad v. Bristol, 155 U. S. 556; Tobacco Co. v. St. Louis, 247 Mo. 374. (2) The evidence before the Public Service Commission, and before the circuit court upon review, conclusively shows that the apportionment of \$34,000 to the Street Railway Company of the total cost of the improvement, \$443,591, was a fair and just apportionment, and the circuit

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court's judgment herein is plainly, flagrantly and indisputably contrary to the evidence. (3) The subway plan of improvement, as approved by the Public Service Commission, was accepted by the Street Railway Company by its written statement of acceptance filed with the Public Service Commission, and the circuit court committed gross error in hearing and considering the Street Railway Company's objection to this plan. (4) In making the apportionment order herein, the Public Service Commission considered the "trackage basis" proposed by the railroads, and also a division of expenses based upon the estimated cost of the street railway track changes, to which was added the saving resulting to the Street Railway Company on account of the removal of crossings. The latter basis of apportionment did not take into consideration expense of raising steam railroad tracks at Fourth and Monterey streets, and it assigned \$569 more to the Street Railway Company than the "trackage basis." (5) The Street Railway Company's contention that the apportionment order of the Commission unjustly required it to pay a part of the cost of changing steam railroad tracks is without merit. The "trackage basis" of apportionment, used in the conference between the parties, lumped together all the costs of changing and reconstructing both steam and street railway tracks, constructing the subway, and repaving the surface of Sixth Street.

M. G. Roberts and H. J. Nelson for St. Joseph Union Depot Company as Amicus Curiae.

Joseph T. Davis for respondent.

(1) The State has power to cause steam railroads to remove tracks from streets and crossings at the cost and expense of the railroads. *Tobacco Co. v. St. Louis*, 247 Mo. 374. (2) Apportionment of costs and expenses upon trackage basis is wrong, and inequitable. *Milwaukee v. Railroad*, 9 Wis. R. C. R. 193; *Milwaukee v. Railroad*, 15 Wis. R. C. R. 762; *Re D. L. & W. Railroad*, P. U. R. 1915 F, p. 180. (3) Respondent should

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not be charged with taking care of cost of changing property of other public service corporations. Every public utility must take care of its own mains and poles, etc. *Re Long Island Railroad Co., P. U. R.* 1917 F, p. 44.

BOND, J.—I. In 1914 the mayor of the city of St. Joseph filed four complaints to the Public Service Commission against various railroad companies and the St. Joseph Street Railway Company, looking to the removal of dangerous street-level crossings. From the order of the Commission apportioning the cost of grade-crossing eliminations to the various companies, an appeal was taken to the circuit court of Cole County by the Street Railway Company. The order was reversed and the cause remanded and from that judgment the Public Service Commission has perfected an appeal to this court.

The plan finally adopted by the Commission for the elimination of the various dangerous grade crossings was agreed to and accepted by all of the railroad companies, and the controversy here is over the amount apportioned to be paid by the Street Railway Company as its share of the total cost.

The Public Service Commission found the total cost of the improvement and subtracted therefrom the estimated consequential damages to private property and apportioned it to be paid by the city. It then allotted the balance to be paid by the railroad companies, which then undertook to meet at Chicago and agree as to the proper apportionments *inter sese*. As a result of that meeting one-seventh of \$238,000, or \$34,000, was allotted to be paid by the Street Railway Company and the remainder of the cost of the improvement was to be borne by the steam railroad companies.

The Street Railway Company being dissatisfied with this charge against it, filed a motion before the Public Service Commission to re-apportion the cost of the improvement as between it and the other railroad companies. Upon the hearing of that motion it was shown by the testimony of various engineers that the

methods usually employed to reach an adjustment of cost in such cases are what are termed the "trackage basis" and the "right of way basis;" that in this instance it was found impracticable to use the "right of way basis," and that the "trackage basis" (by which the estimate of \$34,000 was made at the Chicago conference) was fair and reasonable. At this hearing it was further shown that the Street Railway Company would receive certain benefits from the removal of specified grade crossings equal to that accruing to any one of the steam railroads; but that the steam railroads, in addition to bearing their proportionate part of the cost of subways and track raising, would have to bear also the further expense of installing an interlocking plant and acquiring considerable right of way.

On the other hand the Street Railway Company insisted that it should be required to pay only \$12,500, the estimated cost of the work to be done within the Street Railway Company's track zone.

In estimating a fair apportionment of the amount to be paid by the Street Railway Company, the Public Service Commission then took into consideration certain other elements of constructive cost and benefit of the general improvement and did not base its conclusion solely upon the "trackage basis" by which the cost was apportioned by the conferring railroads at their Chicago conference. In following this plan the Commission took the evidence of its own engineers and experts, as well as the testimony of persons present and taking part in the Chicago conference, and as a result estimated the amount properly chargeable to the Street Railway Company at \$46,569, from which sum it deducted \$12,000 to cover the benefits that would accrue to the steam railroads by doing away with the expense of crossing watchmen, thus leaving the amount allotted to the Street Railway Company \$34,569, or \$569 more than the estimate under the "trackage basis," of which the Street Railway Company was complaining in its motion.

II. In the performance of its duties the Public Service Commission derives its powers to act from the

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terms and intendant of the legislative enactments which created that body. [Laws 1913, p. 556.] Section 50 of that law invests the Public Service Commission with "exclusive power" as to the installation, alteration or removal of the crossings of highways by railroads and street railroads, and "to require, where, in its judgment, it would be practicable, a separation of grades at any such crossing heretofore or hereafter established, and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the alteration or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the State, county, municipality or other public authority in interest." [Laws 1913, p. 589, sec. 50.] It was entirely competent for the Legislature to delegate these functions to a trained body of experts, since they do not involve the exercise of the exclusive power of lawmaking which a Legislature cannot part with. [Public Serv. Comm. v. Union Pac. Ry. Co., 271 Mo. 258, par. 2.]

It cannot be doubted prior to this statute that full power inhered in the State and its auxiliaries in government, such as municipalities, to require separation of the grades at crossings and to impose the entire expense thereof upon an occupying railroad, upon the theory that the permission to cross a highway given to a railroad, is upon the basic condition that it shall be restored, upon the cessation of such occupancy, either by the act of the railroad or in conformity with directions emanating from the State in the exercise of its sovereign powers of police, so as to be safe and convenient for use by the public. [Am. Tob. Co. v. St. Louis, 247 Mo. 1, c. 433 et seq., and cases cited.]

And it cannot be doubted that independently of the provisions of the subsequent acts of the Legislature quoted above, the costs and expenses of the elimination of grades and the restoration of the highway might have been imposed wholly upon the railroads under a valid ordinance of the city of St. Joseph. But the fur-

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ther contention of the learned counsel for respondent, that the Public Service Commission was not authorized under the section of the statutes upon which its action in this matter is predicated, to charge such proportion of the expense to the Street Railway Company, loses sight of the plain language and intent of the statute giving the Public Service Commission "*exclusive power*" to act in such matters and vesting it with complete authority to make an allotment of the expense among other parties in interest than the railroads, and overlooks the further fact that the statute makes it the duty of the Public Service Commission to apportion the expense of crossing eliminations "between state, county, municipal or other public authority in interest." These provisions are modifications of the common by the positive law, by expanding its principles so as to fit the conditions arising in social and industrial progress and to apply to them a fuller and more enlightened justice than was afforded under the narrower view of the common law enunciated at a time when there were fewer diversities of interest to be affected by removal of railroad crossings. In order to be a perfect scheme of social justice, the law must grow and expand to meet the diversified interests which increase as society advances.

We can see no reason why such a statutory modification and reformation of the common law should be subject to any constitutional or legal attack. It is the duty of an intelligent law-making body, in the exercise of its constitutional power, to alter, modify or abolish any rule of the common law which has become obsolete or unequal to the demands of social advancement, and to substitute by statute more refined rules of justice than were afforded by the cruder customs of early stages of society.

Our conclusion is that there is no merit in the contention that the Public Service Commission did not have plenary power to apportion among all the parties in interest, including the street railway company as well as the city and the steam railroads, the cost and

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expense of the general improvements for the safeguarding of the public by its order eliminating the grade crossings in the city of St. Joseph.

III. The only question left is the reasonableness and justice of the apportionment made by the Public Service Commission as far as it involved **Reasonable Apportionment.** the charge of \$34,569 against the complaining street railway. The learned counsel for respondent insists correctly that this should be determined after a review of the evidence, all of which is before us, as in the trial of suits in equity. [Railroad v. Pub. Serv. Com., 266 Mo. l. c. 341; s. c. In Banc, Unanimous Per Curiam on Rehearing, l. c. 346; Lusk v. Atkinson, 268 Mo. l. c 117, 118; State ex rel. v. Pub. Serv. Com., (Sep. Concurring Opinions of BOND, GRAVES and WOODSON, JJ.), 271 Mo. 155 (l. c. 161, 165, 167).] It is further contended that when this is done the street railroad company should not be charged with a greater sum than fifteen thousand dollars, and in fact, on the last page of his brief, the learned counsel for respondent insists that the judgment of the circuit court should be affirmed and the cause remanded to the Commission "with directions to the Public Service Commission to make an apportionment on an equitable basis by apportioning to the street railway company . . . the expense," etc., not to exceed \$15,000. It is apparent, therefore, that the final contention of the respondent street railway company is not that no part of the expense necessarily incident to the general improvements, should be apportioned to it, but only that the Public Service Commission made an excessive apportionment. We are not prepared to concur in that view. After a careful and painstaking review of the relevant testimony in the record before us, we have been unable to reach the conclusion that the finding of the Public Service Commission is not sustained by the clear preponderance of the testimony as to the proper method of making such an apportionment and the proper amount to be borne by the street railway company.

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It necessarily follows that the learned circuit judge fell into error in setting aside the order of the Public Service Commission. His judgment in so doing is, therefore, reversed and the proceeding remanded, and the order heretofore made by the Public Service Commission is affirmed. It is so ordered. All concur; *Blair, J.*, in separate opinion in which *Williams, J.*, joins.

BLAIR, J. (concurring)—I concur in all of this opinion except that portion which holds that in cases like this the court weighs the evidence as in a suit in equity. My views upon that question are expressed in State ex rel. v. Public Service Commission, 196 S. W. 369. *Williams, J.*, concurs herein.

THE STATE ex rel. JAMES P. NEWELL v.
RHODES E. CAVE, Circuit Judge.

In Banc, December 22, 1917.

1. **ELECTION CONTEST: Notice: Defective and Untimely Service: Waiver: Jurisdiction.** A failure to serve the notice of an election contest for a county office within the time prescribed by statute, and the defect in the manner of service, in that it was served by a private individual instead of by an officer, are waived by a general appearance of the contestee. The parties to the proceeding are the contestant and contestee, and the contest for the title to the office is the subject-matter. Jurisdiction of the subject-matter is conferred by law, and its non-existence cannot be waived; but service of process has to do with jurisdiction of the persons or parties to the action, and any defect in that service, as to time or manner, or a failure to serve the notice at all, is waived by the contestee's appearance to the merits. [Overruling any contrary ruling in State ex rel. Woodson v. Robinson, 270 Mo. 212.]

Held, by GRAVES, C. J., dissenting, with whom BLAIR and WILLIAMS, JJ., concur, that the statute requires the notice to be filed with the clerk, and until it is served in the manner and within the time prescribed by statute and filed with him the court obtains no jurisdiction of the subject-matter or contestee, since it is only a notice so served that can be filed.

2. **—: General and Limited Jurisdiction of Circuit Court.** Circuit courts do not exercise a limited jurisdiction in election contests

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or proceed according to a prescribed and exclusive procedure, but are courts of general jurisdiction. It is immaterial how the right claimed or remedy prayed for originated so long as the court's jurisdiction is not limited by the law creating the one or conferring the other, and no such express limitation is found in the laws governing election contests.

Held, by GRAVES, C. J., dissenting, with whom BLAIR and WILLIAMS, JJ., concur, that jurisdiction to hear and determine an election contest is not a part of the general common law jurisdiction possessed by circuit courts, but the tribunal and the proceeding are purely statutory, and as the statutes do not give the court jurisdiction of the subject-matter until a notice, served in the statutory manner, is filed with the clerk, the contestee by entering his general appearance does not give the court jurisdiction.

3. **MANDAMUS: Reinstatement of Cause.** Mandamus is the proper remedy to compel the trial court to reinstate, and to dispose of in the orderly course of procedure, a cause of which it has jurisdiction and which it has dismissed without a hearing

Mandamus.

PEREMPTORY WRIT AWARDED.

Mortimer B. Levy, Peter T. Barrett and Jones, Hocker, Sullivan & Angert for relator.

(1) Jurisdiction of the subject-matter is conferred by law, and its non-existence may not be waived. Service of process has to do with jurisdiction of the person, and is waived by appearance to the merits. *Fithian v. Monks*, 43 Mo. 515; *State ex rel. v. Smith*, 104 Mo. 422; *State ex rel. v. Neville*, 110 Mo. 348; *Dowdy v. Wamble*, 110 Mo. 284; *Railway v. Lowder*, 138 Mo. 536; 7 R. C. L. 1029; *O'Brien v. People*, 216 Ill. 354. (2) An appearance to the merits of an election contest is a waiver of defects in the service. *Lankford v. Gebhart*, 130 Mo. 641; *State ex rel. v. Oliver*, 163 Mo. 679; *State ex rel. v. Spencer*, 164 Mo. 48; *State ex rel. v. McElhinney*, 199 Mo. 67; *Quartier v. Dowiat*, 219 Ill. 326; *State v. Moore*, 54 S. C. 536; *Whitecomb v. Chase*, 83 Neb. 360. (3) A writ of mandamus is the proper remedy to compel the reinstatement of the cause. *Castello v. St. Louis Cir-*

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cuit Court, 28 Mo. 259; State ex rel. Bayha v. Philips, 97 Mo. 347; State ex rel. v. Homer, 249 Mo. 58; State ex rel. v. Shackleford, 263 Mo. 58; State ex rel. v. Holtcamp, 266 Mo. 372.

Major & Revelle, Spencer & Donnell and George B. Webster for respondent.

(1) Election contests are special statutory proceedings in which the courts of first instance exercise a limited jurisdiction and proceed according to a prescribed and exclusive procedure. State ex rel. v. Slover, 134 Mo. 15; State ex rel. v. Hough, 193 Mo. 643; Bradbury v. Wightman, 232 Mo. 394; State ex rel. v. Robinson, 192 S. W. 1001; State v. Gamma, 149 Mo. App. 702; Taafe v. Ryan, 25 Mo. App. 566; McCrary, Elections (4 Ed.), sec. 370; 15 Cyc. 435. (2) Where such a special statutory proceeding is created the particular method of acquiring jurisdiction specified is essential to its exercise. 11 Cyc. 670; 7 Ency. Pl. & Pr. 378; 1 Bailey on Jurisdiction, sec. 129; Fischer v. Langbein, 103 N. Y. 84; Van Loon v. Lyons, 61 N. Y. 22; People v. Police Board, 6 Abb. Pr. 162. This proposition is recognized and approved by our courts in cases of kindred nature. Odle v. Clark, 2 Mo. 13; Hudson v. Wright, 204 Mo. 412; Pattison v. Lutz, 1 Mo. App. 133, Devore v. Staekler, 49 Mo. App. 548. It is not otherwise because our circuit courts are courts of general original jurisdiction. Where such courts are vested by statute with special and limited powers in proceedings which do not belong to them as courts of general jurisdiction, and which are not to be exercised according to the course of the common law, their acts and proceedings are to be treated as those of courts of special and limited jurisdiction. Brown on Jurisdiction, sec. 3-a; Furgeson v. Jones, 17 Ore. 204; Morse v. Presby, 25 N. H. 299; Galpin v. Page, 18 Wall. 350. (3) There is no distinction between this case and State ex rel. Woodson v. Robinson, 270 Mo. 212. The notice of contest given by Newell was no notice because served by a private person. When the contestee appeared seventy-

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four days had elapsed after the expiration of the time within which by statute a valid notice could have been served. There was, therefore, no case pending, no remaining chance to invest any court with jurisdiction, and no act of any party could create or confer any by appearance or consent.

WOODSON, J.—This is an original proceeding instituted in this court, asking for a writ of mandamus against the Honorable Rhodes E. Cave, one of the judges of the circuit court of the city of St. Louis, directing him to reinstate and proceed with the trial of the case of James P. Newell v. Frank M. Slater, an election contest, as to the right to the office of Public Administrator of said city, lately pending in said court, before said judge, and by him dismissed. An alternative writ was issued and served upon Judge Cave, to which he filed a demurrer, thereby admitting the facts stated therein. They are substantially as follows:

Newell, the relator, and Slater were adversary candidates for the office of Public Administrator of the city of St. Louis at the November election of 1916; the Board of Election Commissioners of that city awarded the certificate of election to Mr. Slater. Within the time allowed by the statute the relator, Mr. Newell, served Mr. Slater with a notice of contest. This notice was served, however, not by the Sheriff, but by a private individual. The contents of the notice of the contest is not here material and for that reason is omitted from the statement of the case. The affidavit of the private individual who served Mr. Slater is found in the return. This notice of contest was filed in the office of the Circuit Clerk on the 7th day of December, 1916, and was returnable to the February term, 1917, of the circuit court of the city of St. Louis.

On the 23rd day of December, 1916, the contestee, Mr. Slater, served the relator, Mr. Newell, with a notice of counter-contest, which also is immaterial here. This likewise was served, not by a Sheriff of the city of St. Louis, but by a private individual.

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The opening day of the February term of the circuit court of the city of St. Louis for 1917 was the 5th day of February, and on that day Mr. Slater appeared by his counsel and filed his notice of the counter-contest in court.

On the 24th day of February, 1917, the relator served on his adversary an amended notice of contest. This again was served, not by the Sheriff of the city of St. Louis, but by a private individual. This amended notice of contest was filed by leave of court and in open court on the 24th day of February, 1917.

On the 1st day of March, 1917, the contestee, Slater, appeared again in open court, and filed his motion to strike out parts of said amended notice of contest. The ground upon which this motion was rested had nothing to do with the manner in which service had been had under either the original or amended notice of contest. It set up that the original notice of contest was so defective in the matter of averment respecting the names of disqualified voters and the grounds of their disqualification as not to admit of amendment. The contestee later appeared in court and submitted his motion to strike out parts of his amended notice of contest, and the same was overruled by the court.

On the 4th day of May, 1917, the relator filed his application for a recount of the votes cast. On the same day and for the first time the contestee, Slater, challenged the jurisdiction of the court to proceed with the matter by filing his motion to dismiss the proceedings, for the first time contending that the court was without jurisdiction, for the reason that the notice of contest had not been served by any officer of law authorized to serve process.

On the 4th day of June, 1917, the court sustained this motion to dismiss, whereupon followed this application for a writ of mandamus to compel the court (Judge Cave, presiding in the division where the controversy was pending) to reinstate the contest and proceed with the hearing and determination of the same in orderly course.

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The correct decision of this case turns upon the proper time and manner of commencing and giving the notice of contest to the contestee as required in Section 5924, Revised Statutes 1909, which reads as follows:

"No election of any county, municipal or township officers shall be contested, unless notice of such contest be given to the opposite party within twenty days after the vote shall have been officially counted."

Counsel for respondent insists with much vigor that since the notice of contest prepared and made out by the contestant was served upon the contestee by a private individual, and not the Sheriff of the city of St. Louis, the same was *ab initio* null and void, to the same extent as if it had never been prepared or served by any one; also that service of such notice cannot be waived and in support of that insistence counsel rely with much confidence upon the ruling of this court in the case of State ex rel. Woodson v. Robinson, 270 Mo. 212.

After a careful study of that case it must be conceded that the opinion therein contains language sufficiently broad and comprehensive to warrant the position taken by counsel in this case; but in that case it must be noticed that the contestee, from the very inception of the case, challenged the jurisdiction of the court over the cause for failure of proper service, and renewed the same at every proper step taken thereafter, so the question of waiver involved in this case was not properly before the court in that case for decision; and what was there decided as to this question was therefore, mere *obiter*, and not binding on the court.

In the case at bar, as appears from the statement of the case, which is conceded by counsel for all parties to be correct, the contestee repeatedly entered his general appearance in the cause, and at no time prior to May 4, 1917, challenged the jurisdiction of the court for any reason. Upon that day the contestee for the first time filed his motion to dismiss the cause for the reason that the court acquired no jurisdiction over the subject-matter thereof, because the notice of contest

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had not been served by an officer of the law authorized to serve process, and that the same could not be waived.

Counsel for respondent seem to confuse the subject-matter of the cause with the person of the contestant. It is too plain for argument that the contestant and contestee are the parties to the cause, and the contest of the title to the officer is the subject-matter thereof.

The jurisdiction of the court over the subject-matter of the cause is confessed by law, and its non-existence cannot be waived by the parties; but the service of process has to do with the jurisdiction of the court over the persons or parties to the cause, and that service may be waived by the appearance of the parties to the merits. The authorities are uniform on those questions. [Fithian v. Monks, 43 Mo. l. c. 515; State ex rel. v. Smith, 104 Mo. l. c. 422; State ex rel. v. Neville, 110 Mo. l. c. 348; Dowdy v. Wamble, 110 Mo. l. c. 284, and cases cited; Railway Co. v. Lowder, 138 Mo. l. c. 536; 7 Ruling Case Law, p. 1029; O'Brien v. People, 216 Ill. 354, and cases cited.]

The question here presented for decision is not a new one in this State, nor in the jurisprudence of other states. Long prior to the rendition of the decision in the case of Woodson v. Robinson, *supra*, it had been the well settled law of this State that the contestee, by entering his general appearance in the cause, pleaded to or contesting the merits thereof, waived the question of jurisdiction when not properly and timely challenged.

In the case State ex rel. v. Oliver, 163 Mo. 679, this court said:

"It is thought that James K. Young's appearance as contestee before the clerk of the circuit court, and filing a motion to require his opponent to give security for costs and also his motion to make Oliver's notice of contest more definite and certain, were such appearances as cured a defective service if there were any. [State ex rel. Lemon v. Board of Equalization, 108 Mo. 235.] Besides that, Young appeared before the county clerk and filed a counter notice of contest."

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In State ex rel. v. Spencer, 164 Mo. 48, this court used this language:

"In this case, however, the contestee appeared and filed an answer and cross charges. By so doing he waived the failure to give the notice required by section 7057. [State ex rel. v. Board of Equalization, 108 Mo. l. c. 243; State ex rel. v. Springer, 134 Mo. l. c. 227.] Consent cannot confer jurisdiction over the subject-matter. But the court had jurisdiction over the subject-matter by law. Consent can confer jurisdiction over the person, and a party *sui juris*, may waive even the issue of a summons and appear and answer. If he does so he is as completely in court as if he had been brought in by notice of process. [Coleman v. Farrar, 112 Mo. 54; Fithian v. Monks, 43 Mo. 502; Thompson v. Railroad, 110 Mo. 147; Leonard v. Sparks, 117 Mo. 103.] If the contestee desired to avail himself of the want of notice, he should have seasonably interposed an objection on that ground by a limited appearance to dismiss. [Thompson v. Railroad, 110 Mo. 147.]"

And in State ex rel. v. McElhinney, 199 Mo. 67, the court said:

"But there is a further answer to this whole contention on the part of the relator. It is admitted that as contestee he appeared in the circuit court and filed his answer to the merits of the case, which answer is in part a cross-complaint against the contestant, and having done so, he waived the failure to give the notice required by section 7057. [State ex rel. Folk v. Spencer, 164 Mo. l. c. 54, 55.] It follows, therefore, that in so far as the objections of the relator and contestee to the jurisdiction of the circuit court are founded upon the insufficiency of the notice, it must be held that they are not well taken, and the circuit court had jurisdiction of the contest."

In Quartier v. Dowiat, 219 Ill. 326, the court said:

"The defendant in an election contest who enters his appearance generally and demurs to the petition, waives any ground of objection he may have had to the sufficiency of the service together with the right to

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afterwards enter a personal appearance or to object to the jurisdiction of the court over his person."

In State v. Moore, 54 S. C. 556, it was said:

"Parties who appear by counsel before the board of county canvassers on the protest of an election, to determine whether parts of townships shall be cut off from one county to form part of another, cross-examine the witnesses, and participate in the argument on the merits, thereby waive an objection that they were not formally served with notice."

In Whitcomb v. Chase, 83 Neb. 360, the Nebraska statutes provide for the appeal of an election contest from the county court to the district court by taking certain steps. Objection was made by the contestee to the manner in which this appeal was taken, and the Supreme Court of that State said on this subject:

"The district court having been given appellate jurisdiction of the subject-matter of such contests, mistakes and irregularities in perfecting an appeal will not deprive it of such jurisdiction. Defects and irregularities in perfecting an appeal may be waived by the parties, and failure to make seasonable objection to the jurisdiction of the district court will constitute a waiver."

In Dudley v. Superior Court, 110 Pac. 146, the contestee first demurred to the statement of the contestant. The California statute provides that a demurrer was a general appearance, and without a statute our courts hold to the same rule. After his demurrer was passed upon, the contestee objected to the service of notice, and it was held that his objection came too late. The court said:

"It further appears by the petition that upon the same date when the order was made calling the special session the petitioner, defendant in said contest, filed a general demurrer to the statement of Jones, the contestant. Under section 1014 of the Code of Civil Procedure the effect of said demurrer was the entering of an appearance to the proceeding. The parties then being in court, and petitioner herein having entered

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an appearance to the proceeding, the neglect of the clerk to issue the citation in proper form, or the service thereof, is of no materiality in determining the question of personal jurisdiction."

In short, the cases just considered clearly hold that the law confers jurisdiction over the subject-matter of an election contest, and that the service of the notice of contest required by said Section 5924 by the proper officer, or the general entry of appearance of the contestee, gives the court jurisdiction over his person.

II. Counsel for respondent in a broad and general sense do not controvert the doctrine announced in paragraph one of this opinion, but insist that: "Election contests are special statutory proceedings in

General Common Law. which the courts of first instance exercise a limited jurisdiction and proceed according to

Election Contest: a prescribed and exclusive procedure," and, therefore, the conclusions reached in the previous paragraph are not sound. In our opinion that insistence is untenable. The circuit court is a court of

Jurisdiction. general jurisdiction, given jurisdiction over matters of law and equity, and it is entirely immaterial how the right claimed

or remedy prayed for originated, so long as the jurisdiction of the court is not plainly limited by the law creating the right or conferring the remedy. Public policy is against placing special limitations upon the jurisdiction of courts of general jurisdiction, and the policy of the courts is to frown upon such limitations unless it clearly appears from the act conferring the jurisdiction. That the Legislature, by the statute under consideration, intended no such limitation is clearly shown by the authorities heretofore considered. We are, therefor, of the opinion that the case of State ex rel. Woodson v. Robinson, supra, in so far as it is in conflict with the views here expressed should be overruled and it is accordingly done.

III. It is no longer an open question in this State that mandamus to compel the reinstate-

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Mandamus. ment of this cause and its disposition by the circuit court in the orderly course of procedure is the proper remedy. The following authorities so hold: *Castello v. St. Louis Circuit Court*, 28 Mo. 259; *State ex rel. Bayha v. Philips*, 97 Mo. 331, 347; *State ex rel. v. Homer*, 249 Mo. 58; *State ex rel. v. Shackelford*, 263 Mo. 52, 58; and *State ex rel. v. Holtcamp*, 266 Mo. 347, 372.

For the reasons stated the alternative writ heretofore issued is made permanent.

All concur except *Graves, C. J.*, who dissents in a separate opinion in which *Blair* and *Williams, JJ.*, concur.

GRAVES, C. J. (dissenting)—I. I cannot concur with my learned brother in this case. I do not agree that jurisdiction of the subject-matter was not involved in the case of *State ex rel. Woodson v. Robinson*, 270 Mo. 212. The challenge of jurisdiction was sufficiently broad to cover jurisdiction of the subject-matter, as I understand subject-matter, in so far as it pertains to jurisdiction. It can be said that the question of waiver of jurisdiction (jurisdiction of the person) was not in that case, because throughout the question of no jurisdiction was urged. This matter of waiver was discussed in the *Woodson* case, because urged by respondent in that case, but it did not remove from the case the two questions, i. e.: (1) jurisdiction of subject-matter, and (2) jurisdiction of person, both of which were preserved in the case. Jurisdiction of the court over the subject-matter of that contest was in the case, and as the writer of the opinion therein we purposely ruled thereon. So to my mind what was said, being upon an issue directly raised, was not *obiter*. It is true the case might have properly passed off on the question of jurisdiction of person, but both matters were raised, and decided.

II. Nor do I agree, in the instant case, that the circuit court ever acquired jurisdiction of this contest.

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Under the facts stated by our learned brother, the very statute precludes the jurisdiction of the circuit court, and this we will point out presently.

Jurisdiction of Election Contest. Whilst it is true that the circuit courts are courts of general common law jurisdiction, we must not overlook the fact that election contests were unknown to common law. "At common law there was no such proceedings known as a contested election, and therefore, we can get no aid in our inquiry from that quarter." [State ex rel. v. Hough, 193 Mo. l. c. 643.] "A contested election is a purely statutory proceeding in Missouri, both as to the tribunal and the character of the proceeding, and was unknown at common law." [State ex rel. v. Slover, 134 Mo. l. c. 15.]

In other words, such proceeding is a code unto itself and all questions must be determined from the provisions of the law concerning such contest. [State ex rel. v. Spencer, 166 Mo. l. c. 285.] The jurisdiction to hear and determine a contest is not one of general jurisdiction possessed by courts having common law jurisdiction, but the tribunal and procedure are purely statutory. But for the provisions of section 9, article 8, of the Constitution, the Legislature could have had these contests adjudicated by tribunals other than courts of law. [9 R. C. L., sec. 148, p. 1158; State ex rel. v. Hough, 193 Mo. l. c. 645.] In this regard such section of the Constitution is a limitation upon the Legislature, and that body was compelled to designate courts of law to determine contests, but this does not change the fact that the tribunals of law so selected are special tribunals, and operate under a code unto themselves.

Now to this code we turn to see if the court *nisi* has jurisdiction in this case.

III. By Section 5924, Revised Statutes 1909, the circuit courts of the State were designated as tribunals before which contests of the character of

No Jurisdiction Without Notice. the one involved here should be heard. By Section 5928, Revised Statutes 1909, the proceeding for determining the contest is

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made a summary one. But the contest about to be presented must be one within the statute, before this special tribunal possesses any power to act. To illustrate: a notice of contest duly served, must be filed with the clerk of such court, at some time prior to the date of the trial, before such court can be possessed of the cause. By possessed of the cause, we mean the power and right to determine it. A contestant might prepare his notice of contest in due form, and might have it duly served in the method prescribed by our ruling in State ex rel. v. Robinson, 270 Mo. 212, and yet the circuit court would not have jurisdiction of that contest. The law requires more, not in specific language, but by our construction thereof. Thus in State ex rel. v. Hough, 193 Mo. l. c. 648, it is said: "And while the statute does not designate the time for the filing of the notice in the office of the clerk inasmuch as a copy of the notice containing all the grounds of the contest is served on the contestee, it would seem that the filing of the original with the clerk at any time before the commencement of the term, to which the contest is returnable, would answer all the requirements of the law."

What we want to emphasize is the fact that there is no way, earthly, by which the court can acquire jurisdiction of the particular contest (either as to its subject-matter or the parties thereto) except by the filing of a legally served notice with the clerk of the court. When a legally served notice is filed with the clerk then the court for the first time becomes possessed of the contest. If this were not true the contestant could change his mind about contesting the election and put his duly served notice in his pocket, and keep it there, and yet we would have a contest pending in court. This will not do.

Now if it requires the filing of something with the clerk to give the court jurisdiction of the subject-matter, as well as of the persons of a particular case, what must be the character of this "something?" In an ordinary law suit the court grabs jurisdiction of the subject-matter of the particular suit, when the petition

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is filed, which petition invokes its jurisdiction. It gets jurisdiction of the person, on the one side, by the filing of the petition, and on the other by the service of a summons. Thus the jurisdiction of the subject-matter of the particular case, and the jurisdiction of persons interested therein, is made complete. But if no petition was filed, it would be foolish to say that the court had acquired jurisdiction of the subject-matter of that particular case, although it might have general jurisdiction of the cases belonging to the class. Whether you call it jurisdiction or the invocation of jurisdiction, is immaterial. Certain it is the courts of law cannot try a case before a petition is filed, and whether the filing of the petition is the thing which gives the jurisdiction of the subject-matter of the particular case, or is the thing which invokes the general jurisdiction of the court, is a matter we need not discuss, for the purpose we now have in view. It is clear that the court is powerless to act until a petition is filed.

With the foregoing ideas in mind let us now revert to Section 5924. Among other things this section says: "but no election of any such school directors, of any county, municipal or township officers, shall be contested unless notice of such contest be given to the opposite party within twenty days after the votes shall have been officially counted." The section then provides the manner of serving this notice, and in State ex rel. v. Robinson, 270 Mo. 212, we said that service must be by an officer of the court.

Under these statutes (which are a code unto themselves) and before this special tribunal, the process is this: the contestant prepares his notice and has it served, and then files this notice duly served, with the clerk of the court. When such an instrument is filed, the court for the first time becomes possessed of the contest. If no such instrument is filed, then the court never becomes possessed of the contest. Under this special code there is a condition precedent, which must be performed before the court can become possessed of the contest. This condition precedent is the filing of a duly served notice of contest with the court or its

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clerk. If, as in the case at bar, under the ruling in State ex rel. v. Robinson, the contestant has never obtained service of a notice, how then can he meet this condition precedent? If he filed a mere notice of contest, without any service, could it be said that the court had acquired the right to determine such a contest? The thing which invokes the jurisdiction of the special tribunal for such cases is the filing of two things: (1) a notice of contest and (2) a certificate of due service of that notice. When these two things are filed the special tribunal acquires jurisdiction of the contest, i. e. the subject-matter of the proceeding, and not before. The jurisdiction of the special tribunal is not invoked until this is done. How can you waive a jurisdiction which has never been invoked?

My position is, that under this special code, this special tribunal acquires no right to act until there is filed with its clerk a notice of contest, served within the time and in the manner prescribed by law. This because of the prohibition in the statute, which says "no election . . . shall be contested unless notice of such contest be given to the opposite party."

The language of this prohibition upon these special tribunals is strong and emphatic. By its terms the hands of the special tribunals are stayed until the filing of such notice with legal service thereon. It requires the filing of both, before the stay of the statute is raised and the special tribunal is permitted by law to proceed. In the instant case there was no legal service (which is no service at all), and hence the notice of the contest and legal service thereof was not filed. Under such circumstances the circuit court has no more right to proceed than would a justice of the peace. The condition precedent to jurisdiction has never been met. It is not a question of waiving jurisdiction over the person, but is a question of whether the contestant has done the things pre-requisite to a contest at all.

IV. We have no quarrel with the proposition that jurisdiction of the subject-matter is conferred by law. But what we do urge, is, that the power which confers

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by law the jurisdiction of subject-matter, has just as much right to limit this jurisdiction, as it has to grant it in the first place. And if the law-making power which granted the jurisdiction of subject-matter to these special tribunals chose to limit its exercise by imposing conditions precedent, it could do so. So it has done in this class of cases, and until the condition precedent has been met no jurisdiction of subject-matter is possessed by the tribunal. [State ex rel. v. Spencer, 166 Mo. l. c. 286.] The fact must not be overlooked that this is a special jurisdiction and a special tribunal under this special code. By this we mean that although it is a court with common law powers, which is acting, yet its power to act had to be specially conferred by statute in contests of elections.

Nor have we anything to urge against the proposition that where general jurisdiction is conferred, then if the case belongs to the class, it is usually sufficient to confer jurisdiction of subject-matter in the specific case. This is not always true, however. Thus circuit courts have jurisdiction to issue writs of prohibition, yet we have held that they may exceed this jurisdiction by trying to prohibit an executive board from acting in the impeachment of a city marshal. [State ex rel. McEntee v. Bright, 224 Mo. 514.] So, too, circuit courts have general jurisdiction to cancel deeds which cloud titles to land, yet we prohibited a circuit court from hearing a case to cancel such a deed when the land was not in Missouri. [State ex rel. v. Grimm, 243 Mo. 667.] So, too, circuit courts have general jurisdiction over action for damages, yet we would hardly hold that such an action would lie against the Governor of the State for an alleged failure to perform one of his duties. [State ex rel. v. Shields, ante, p.—.]

But the case at bar is not in either of these categories. Here we have a special jurisdiction in a special forum under a special code. That it is a special forum is made more clear by the fact that in original contest proceedings in this court, a part of the judges and not all the court may be the forum.

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Nor have I any quarrel with the rule of waiver as expressed in the cases of State ex rel. Folk v. Spencer, 164 Mo. 48, and State ex rel. Sale v. McElhinney, 199 Mo. 67. The first of these cases involves a contest over the office of Circuit Attorney in St. Louis, and the latter involves a contest over the office of circuit judge of the same city. In the matter of a contest for circuit judge the statute (Sec. 5957, R. S. 1909) requires the contestant to file a petition in court just as in ordinary civil actions. Summons must issue as in other actions. Answer must be filed, as in ordinary actions. Thus it will be seen that the procedure is entirely different from the one in the case at bar. The jurisdiction of the subject-matter is invoked by the filing of the petition, and this particular jurisdiction of the subject-matter of this kind of a contest, is complete, although no service of summons be had. As long as the petition remained on file, and the case was not dismissed, the jurisdiction of the subject-matter, i. e. that contest, was there. Of course it would require the jurisdiction of the person, and this could be waived, by the party coming in and doing things which amount to a waiver of jurisdiction of person.

So, too, in contests over the circuit attorney's office in St. Louis. By Section 5965, Revised Statutes 1909, these contests must proceed as those for circuit judge. But these cases are not like the case involved in the instant case. The procedure is altogether different. Those cases have the same course (filing petition, issue and serving of summons and filing answer) as ordinary civil actions. The question of waiving personal service in such cases would be just as in the regular civil case.

The case of State ex rel. v. Oliver, 163 Mo. 679, cited by my brother, does contain some language which gives aid to the question of alleged waiver in this case, because in that case (a case in prohibition here) the prohibition proceeding grew out of a contest for a county office. When the case is fully read, we think it no authority. There was no special point made in the opinion on this matter, but it seems to have been a casual outburst of the judge writing the opinion. On

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page 690, Judge SHERWOOD did say: "Upon this order hinges the proper disposition of this cause, because it is thought that James K. Young's appearance as contestee before the clerk of the circuit court, and filing a motion to require his opponent to give security for costs and also his motion to make Oliver's notice of contest more definite and certain, were such appearances as cured a defective service if there was any. [State ex rel. Lemon v. Board, 108 Mo. 235.] Besides that, Young appeared before the county clerk and filed a counter notice of the contest." The whole fight in that case was upon other matters and this language of the learned jurist seems to have been by the wayside. But the case he cites for support (State ex rel. Lemon v. Board, 108 Mo. 235) is not a contested election at all, and is and was no authority whatever for the side remarks above quoted from Judge SHERWOOD.

On the contrary in a contested election for sheriff (Castella v. Ceri, in the circuit court of St. Louis) Judge Lackland, the circuit judge, ruled that the service of a counter notice of contest did not waive jurisdiction (*Vide*, Castello v. St. Louis Circuit Court, 28 Mo. l. c. 265), and this ruling was approved by this court (Castella v. St. Louis Circuit Court, 28 Mo. l. c. 274, et seq.), wherein we refused to mandamus the circuit court to proceed, the very thing we are asked to do in this case. This case is exactly in point in cases involving contests of county officers.

When it is recalled that contests of elections are special proceedings, under a specially created jurisdiction, with a specially provided code, we are forced to the conclusion that a duly and legally served notice is jurisdictional. [State ex rel. v. Spencer, 166 Mo. l. c. 286.] County courts are given jurisdiction to hear and determine road cases, but the procedure calls for a certain notice. In that line of cases we have held (Railway v. Young, 96 Mo. l. c. 42) that: "The fact of notice having been given in the mode pointed out by the statute, is as much a jurisdictional prerequisite as is the residence of the statutory number of petitioners. If either be lacking, the jurisdiction fails, and for the obvious reason

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that such proceedings, being *in invitum*, in derogation of common law and common right, are always regarded as *strictissimi juris*, and receive no help from intendments or implications, and so this court has repeatedly held."

So in the case at bar. The proceeding is one unknown to the common law. The certificate of election (a valuable right) is being taken. The proceeding a special one, and summary in character, before a special tribunal named in the special code provided for the conduct of the proceeding—we therefore reiterate what we said in *State ex rel. v. Robinson*, that without notice of a contest duly and legally served, within the time prescribed, the circuit court (the special tribunal in this class of contests) was absolutely without jurisdiction and such jurisdiction could not even be given by consent. For these reasons we dissent.

Blair and Williams, JJ., concur in these views.

JENNIE W. BENNETT et al., Appellants, v. THOS. L. WARD.

In Banc, December 22, 1917.

1. **DELIVERY OF DEED.** Where the scrivener, at grantor's direction, took the deed, drawn according to her instructions, from her residence and delivered it to the grantee and he deposited it in a bank, where it remained until her death, and immediately thereafter grantee appeared with it at the Recorder's office and left it with him for record, the deed was delivered to the grantee.
2. **CAPACITY TO MAKE DEED.** If the grantor had sufficient mental capacity to understand the nature of the particular transaction and with such understanding voluntarily entered into it and consummated it by making a deed, she was not at the time mentally incapable of making the deed.
3. ——: **Use of Morphine: Cancer.** The fact that the grantor, a woman of more than ordinary intelligence and business ability and understanding the reciprocal obligations assumed by the grantee in consideration of the conveyance, was at the time afflicted with cancer and occasionally was given morphine to relieve her suffering, but in no wise rendered irrational either by the

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disease or opiate, does not establish mental incapacity to make a deed conveying to her brother her home place.

4. **UNDUE INFLUENCE: Power to Arbitrarily Dispose of Property.** The owner of property has unlimited power to alienate it by deed or will, if the act is understandingly done and is free from coercion, fraud, mental incapacity and undue influence; and this power of arbitrary disposition of a capable and uninfluenced person pertains to absolute ownership, and may be reflected in deeds or wills exhibiting the loves, hates, partialities or caprices of the grantor or testator, which of themselves are not sufficient reasons for annulling the instruments.
5. **—: Meaning.** By undue influence is meant that the conveyance when made did not reflect the grantor's wishes and intentions, but the designs and intentions of some one who controlled the grantor's acts.
6. **—: Preference Among Kindred.** The intention of a childless aged widow to prefer a brother to two sisters in the disposition of her real estate, deliberately and clearly expressed in the deed, is not sufficient to defeat the conveyance, in the absence of evidence that the reason for the preference was extraneous domination of her mind.
7. **—: Fiduciary Relation: Presumption: Acts of Kindness.** The facts that the childless widow, upon being informed by physicians that she was afflicted with cancer which would soon end her life, not wishing to go to a hospital, went to her brother's home and it was there decided that his two daughters would take her to her own home and care for her through her illness, which they did until her death a year later, and that the last three weeks of her life her brother was with her constantly and assisted her in some business transactions which she was unable to attend to, being acts of affection and kindness, do not suffice to create such a fiduciary relation as afford a just basis for a presumption of undue influence on the part of the brother, who was the grantee in the deed made in his absence three months prior to her death, by which after making gifts for the support and education of some minor step-grandchildren, she conveyed, in consideration of his many uncompensated acts of kindness and an agreement that he was to care and provide for her until her death, her real estate to him, to the exclusion of her two married sisters.
8. **—: Cogent Proof.** In a suit to set aside and annul a deed between competent parties, absent any legal presumptions, the same degree of proof must be adduced as is prescribed by courts of equity when such a conveyance is sought to be annulled or its terms altered by oral evidence.

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Appeal from Bates Circuit Court.—*Hon. C. A. Calvird*,
Judge.

AFFIRMED

R. M. Robertson and Faulke & Brown for appellants.

(1) The existence of undue influence may be shown from the relationship and surroundings of the parties at and previous to the time; the nature and character of the contract, and any unreasonable and unfair advantage secured by it. It devolves upon the respondent to show "an honest and fair deal" in every respect. *Kirschner v. Kirschner*, 113 Mo. 297; *Martin v. Baker*, 135 Mo. 504; *Ennis v. Burham*, 159 Mo. 518; *Gay v. Gillilan*, 92 Mo. 251; *Harvey v. Sullens*, 46 Mo. 152; *McFaddin v. Catron*, 120 Mo. 273. (2) The evidence and physical facts in this case show that Nannie Mace was completely in the hands of, and under the control of, in body and mind, her brother and his family, at the time of the making of this deed; and was not capable of measuring minds with him in the preparation and execution of a contract of this character. For more than a year before she had been afflicted "with cancer in every organ; the womb, liver, breast and lungs; the hospital surgeon, after an examination, refused to operate, and says she only has about three months to live." Reason tells us there could be no greater physical and mental pain and suffering than her condition from that time until the day of her death was bound to produce; and this deed in question could not have been her "voluntary act and deed" in her condition and under the surroundings. *Heimeyer v. Heimeyer*, 259 Mo. 534; *Cornet v. Cornet*, 248 Mo. 184; *Kincer v. Kincer*, 246 Mo. 419. (3) The physical facts as shown by the condition of Nannie Mace, at the time this deed was executed; her letters, the two wills, and the peculiar wording and reasons given for its execution in the face thereof, shown conclusively that there was some undue influ-

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ence at work at the time of its execution. It matters not what witnesses may testify to in this case, Nannie Mace's great affliction and dependent position, coupled with these instruments in writing, tell the whole story; she was unduly influenced, if she knew it at all. It was not her mind framing these strange phrase as an excuse for making this deed as shown in the face thereof; it is unreasonable; it is not her free act and deed. Jones v. Belshe, 238 Mo. 524-540; Yosti v. Laughran, 79 Mo. 594; McClure v. Lewis, 72 Mo. 314; Hall v. Napenberger, 97 Mo. 509. (4) The physical condition of Nannie Mace from August 31, 1911, until her death on September 14, 1912, was as pitiable and helpless and dependent as can be imagined. She was stricken with "cancer of the ovaries," which for more than a year before the making of this deed had spread and entered all the most vital and sensitive organs of her body. All know that ailments of this character affect the mind, to some extent at least; and if this be true, then Nannie Mace's mind and will power was not in a condition to meet on equal terms the mind and will power of respondent in this case in a contract giving him every foot of real estate she owned. 2 White & Tudor's Leading Cases in Equity, p. 1156; Cadwalader v. West, 48 Mo. 483; Street v. Goss, 62 Mo. 226; Martin v. Baker, 135 Mo. 504; Gay v. Gillilan, 92 Mo. 250. (5) The past history of all the parties to this suit, the helpless and dependent condition of Nannie Mace in the hands of respondent and his family, taken in connection with the peculiar wordings of this deed, in explaining why it was made, show conclusively some undue influence, and that it was obtained by fraud. This deed "convicts itself." It spells "fraud" in many places. Major v. Kidd, 261 Mo. 618. "All these things point to a master mind." Mowry v. Norman, 204 Mo. 192; Roberts v. Bartlett, 190 Mo. 701; Myers v. Hauger, 98 Mo. 438. "When we consider the assiduous care used in order to make it appear to be her own free act, we are irresistibly forced to the conclusion that the attorney was acting in the interest of the defendant in carrying

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forward their purpose in securing this property." *Martin v. Baker*, 135 Mo. 509. The record in this case clearly shows that the deed in question was never delivered. *Scott v. Scott*, 95 Mo. 319; *Huey v. Huey*, 65 Mo. 689; *Sneathen v. Sneathen*, 104 Mo. 209; *Givens v. Ott*, 222 Mo. 395; *Murphy v. Gabbert*, 166 Mo. 601; *Standiford v. Standiford*, 97 Mo. 231; *Terry v. Glover*, 235 Mo. 550.

W. M. Bowker and Lee B. Ewing for respondent.

(1) The finding of the trial court in this case is absolutely correct. There is no testimony to base a finding either that the grantor in the deed, Mrs. Mace, was of unsound mind, or had been induced to execute the deed by reason of undue influence on the part of Thomas L. Ward. *Jones v. Thomas*, 218 Mo. 508; *Teckenbrock v. McLaughlin*, 209 Mo. 533; *Seibert v. Hatcher*, 205 Mo. 83; *McDermott v. Keesler*, 240 Mo. 278; *Wing v. Havelik*, 253 Mo. 502; *Lee v. Lee*, 258 Mo. 599; *Winn v. Grier*, 217 Mo. 440; *Turner v. Anderson*, 236 Mo. 523; *Gibony v. Gibony*, 230 Mo. 106; *Current v. Current*, 244 Mo. 429. (2) Influence which is obtained over a party by kindness or affection so as to create a desire on the part of the party in favor of one to the exclusion of some one else, is not undue influence. *Andrew v. Linebaugh*, 260 Mo. 623; *Turner v. Anderson*, 236 Mo. 523; *Seibert v. Hatcher*, 205 Mo. 83. (3) Old age and sickness do not, in and of themselves, constitute incapacity to transact the business of devising or conveying lands. *Lee v. Lee*, 258 Mo. 599. (4) The fact that a daughter took a deed from her father, who was seriously afflicted with consumption and asthma, to lands worth \$1500, upon the agreement to furnish him a home and give him personal attention during his life, was not any fraud, altho he was living with said daughter at the time; neither did any such circumstance create any fiduciary relations so as to raise a presumption of undue influence; and in such case it is held that there was no evidence tending to show the exercise or existence of undue influence, and that the deed could not be set aside.

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on any such ground—and that courts sit to enforce fair and just contracts—not to abrogate them. Lee v. Lee, 258 Mo. 599. (5) The influence exercised upon a party sufficient to invalidate a deed or a will, must be of such a nature and character as amounts to over-persuasion, coercion or force, destroying his free agency or will-power, as contradistinguished from the mere influence of affection or attachment or the desire of gratifying the wishes of one beloved, respected and trusted by him. Unequal distribution of property among one's kin is not sufficient to establish undue influence. Winn v. Grier, 217 Mo. 420. (6) Even though the mind of a party be weakened by disease, there must be substantial evidence that the influence of another operated and was undue to shape the will or deed before it can be held to be void because of undue influence, and it must be proven that such influence was exercised. Turner v. Anderson, 236 Mo. 523. (7) There was a good delivery of the deed in this case. Givens v. Marbutt, 259 Mo. 223; Seibert v. Highan, 216 Mo. 121; Chambers v. Chambers, 227 Mo. 262.

BOND, J.—This action is to set aside a deed conveying certain real estate in and near Stockton, Missouri, on the alleged grounds of non-delivery of the deed, mental incapacity of the grantor and undue influence.

On September 14, 1912, the grantor in the deed, Nancy Mace, a widow, died at the age of sixty-two years, leaving no children, her heirs at law being two sisters, Jennie Bennett, a resident of Texas, Mary Tyler and a brother, Thomas L. Ward, both residents of Missouri.

On September 27, 1911, a year before her death, Mrs. Mace executed a second will, substantially the same as one previously drawn, except that after making provision for the education of two step-grandchildren, a bequest to Mrs. Tyler of one dollar and certain small bequests, she gave the annual income of the residue of her estate to Mrs. Bennett and Thomas L. Ward, during their lives, with provision that if the latter died before Mrs. Bennett, his share should go to his wife, with remainders over to certain specified persons.

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In August, 1911, Mrs. Mace became ill and upon examination by surgeons at Kansas City, was informed that she was suffering from cancer, which would end her life in a short time. From Kansas City she went to the home of her brother, Thomas L. Ward, the defendant herein, and it was then decided, as she did not want to go to a hospital, that her nieces Nannie and Corolla Ward would take her to her own home and care for her through her illness. When she reached her own home, Mrs. Mace requested her niece to write, advising her sister Mrs. Bennett of the seriousness of her illness and inviting her to come to Stockton to see her. Mrs. Bennett came, and it appears from the testimony in the record (denied by her) that soon after her arrival she expressed her dissatisfaction with Mrs. Mace's will, that she was not made executrix thereof, and hinted at various times that Mrs. Mace was mentally irresponsible. She finally quarreled openly with Mrs. Mace and left for her home in Texas. However, thereafter Mrs. Mace, through her niece, wrote several friendly letters to her. It further appeared, from a letter written by Thomas Ward to his sister Mrs. Bennett, after the death of Mrs. Mace, that some ill-feeling existed between them.

On June 24, 1912, Mrs. Mace executed a general warranty deed to all of her real estate to her brother, Thomas L. Ward. The consideration in the deed was an agreement by the grantee to pay a certain sum to the grantor's two step-grandchildren until they became of legal age; to pay a certain sum to Mrs. Bennett upon condition she received in full for her interest in Mrs. Mace's estate, with the further agreement that Thomas Ward was to care and provide for Mrs. Mace until her death.

The deed also contained this clause:

"The grantee herein, T. L. Ward, is my brother. In years past I have shared and enjoyed his home and received substantial and valuable assistance from him, for which he has received no moneyed compensation; during the last year he has attended to my business affairs, and his family have faithfully and affectionately cared for and nursed me during my protracted illness

within that time, and these considerations have influenced me, together with the foregoing expressed considerations, in the execution of this conveyance."

This deed was drawn by a Mr. Bannister, of Eldorado Springs, at the request of Mrs. Mace, who instructed him, after it was signed and acknowledged, to deliver it to her brother, Thomas L. Ward. The deed was duly delivered and Mr. Ward left it for safe-keeping at his bank at Eldorado Springs. After the death of Mrs. Mace the deed was taken to the Recorder's office and placed of record. This action was brought to set the deed aside. Judgment was for defendant and plaintiffs appealed.

II. There are only three questions which could possibly arise in this record: first, the contention by appellants that the deed, which it is the object of this suit to annul, was never delivered by the grantor to the grantee; second, that the grantor at the time of the execution of the instrument was mentally incapable of entering into a contract; third, that the deed was made as the result of undue influence upon the mind of the grantor at the time of its execution.

Taking these in order, the evidence as to the delivery of the deed is clear and complete. The scrivener who prepared it and witnessed the acknowledgment as a notary public, left the residence of the grantor with the deed in his pocket and delivered it to the grantee at Eldorado Springs. His testimony is clear, explicit and full as to these respects. The testimony of two bankers is to the effect that the grantee brought the deed into the bank of which they were officers, and deposited it there. As against the positive testimony of these witnesses, there is none of a contrary nature other than inferences sought to be drawn from the evidence tending to show that immediately after the death of the grantor, the grantee and his daughter who carried a black bag, appeared at the Recorder's office and the deed was taken out of the bag and handed to the Recorder and its filing duly noted. In these circumstances we must find

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that the claim of appellants that the deed was not delivered is unsupported by the testimony on the hearing. Our conclusion is that the delivery of the deed and its acceptance by the grantee was not disproved by the evidence, and that plaintiffs have failed to establish that contention as a basis for their suit to annul the deed. [Schooler v. Schooler, 258 Mo. l. c. 91, 92, and cases cited; Burkey v. Burkey, 175 S. W. l. c. 624, and cases cited.]

III. As to the second point, incapacity of grantor, there is an utter failure of proof on the part of the plaintiffs (appellants) to establish that contention. On the contrary, the whole tenor of the testimony ^{Mental Incapacity.} demonstrates that the grantor, Mrs. Mace, was a woman of more than ordinary intelligence and business ability, and there is nothing in the evidence which tends to show a want of comprehension on her part of the nature and effect of the deed when executed. The only basis for the inference attempted to be drawn in support of this contention, is the fact that she was suffering from a cancer and occasionally was given morphine to relieve her suffering. There is no hint in the testimony that she was rendered irrational either by her disease or its treatment, or that she was lacking in mental capacity to understand the reciprocal obligations assumed by the grantee in consideration of the conveyance of the property to him. On this point the rule is, as stated by WALKER, J., with reference to both deeds and wills, viz: "Did the testator or the grantor have sufficient mental capacity to understand the nature of the particular transaction and with such understanding voluntarily enter into and consummate the same?" [Masterson v. Sheahan, 186 S. W. 524.] Applying this test there is no evidence whatever in the record of a lack of capacity on the part of Mrs. Mace when she executed and delivered the deed.

IV. The only remaining inquiry is whether or not she was unduly influenced when she wrote the deed. The

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owner of property has unlimited power to alienate it by deed or will, if the act is understandingly done and is free from coercion, fraud or lack of mentality or undue influence. This right of arbitrary disposition of a capable and uninfluenced person is a corollary of absolute ownership of property, and may be, and often is, reflected in deeds or wills exhibiting the loves, hates, partialities or caprices of the testator or grantor, which cannot be annulled for these reasons only. [Hayes v. Hayes, 242 Mo. l. c. 169, and cases cited.] The deed under review shows the purpose of the grantor to prefer a brother to two sisters in the disposition of her real estate. The intent to do this was deliberately and clearly expressed in the instrument. Such purpose, however, is not sufficient to defeat the deed in the absence of any evidence in the record, that the reason for the preference was extraneous domination of the mind of the grantor to the extent, that when the conveyance was made, it reflected not her intentions or wishes, but the different designs and intentions of some one who controlled her action. For this is what is meant by undue influence (Hayes v. Hayes, *supra*, l. c. 169; Masterson v. Sheahan, 186 S. W. l. c. 526, par. II), as to the existence of which there is a complete dearth of positive testimony.

It is, however, contended by the learned counsel for appellants, that the record and the terms of the deed disclose a fiduciary relation on the part of the grantee, which afforded a basis for a legal presumption of undue influence, which was unrebutted by the evidence adduced on the trial. A careful examination of the terms of the deed and other relevant testimony in the record, fails to satisfy us of the existence of such a fiduciary relation on the part of the grantee and the grantor as to afford any just basis for the presumption of undue influence. Shortly before her death the two daughters of her brother, defendant Ward, left their home and went to Mrs. Mace's home to care for her during her illness, and the last three weeks of her life her brother was with her constantly and doubtless assisted her in some business transactions which she was unable to

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attend to as had been her custom before her affliction developed. We see nothing in these mere offices of affection and kinship which suffice to make presumptively invalid any recognition thereof by the recipient in the disposition of her property. She appears to have been an educated woman, intelligent and normal in her ways of life and sensitive to offices of kindness. We see nothing unnatural in a disposal of her estate evidencing her appreciation of the attentions and assistance which she received from her brother and his family during her last illness. That she had this thought in mind is clearly shown by the recitals of the deed as to considerations for it.

It must be borne in mind that this is an action to set aside and annul a conveyance by deed between competent parties and that, absent any legal presumptions, the same degree of proof must be adduced in support of such an attack as is prescribed by courts of equity when the terms of such conveyance are sought to be altered or the conveyance annulled by oral evidence. [Burkey v. Burkey, *supra*.]

Having reached the conclusion that no sufficient fiduciary relation existed to afford an inference of undue influence, and being unable to find in the entire record any evidence otherwise sufficient to invalidate it, there is no escape from the conclusion that the judgment of the trial court is manifestly correct and should be affirmed. It is so ordered. All concur, except *Williams, J.*, who dissents.

CITIZENS TRUST COMPANY and PEMISCOT COUNTY BANK, Appellants, v. A. C. TINDLE et al.

In Banc, December 22, 1917.

1. **PARTIES PLAINTIFF:** Suit on Bank Bond: Assignee. An assignee of all the assets, including choses in action, claims and demands, due or to become due the assignor, to be collected by the assignee and applied to the use of the assignee, is authorized to sue on a

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bond given by an employee of the assignor as a guaranty of efficient service, since such assignment constituted the assignee the trustee of an express trust.

2. _____: _____: _____: **Misjoinder of Parties.** Nor did such assignment and statutory authority to sue preclude the assignee from joining the assignor as a party plaintiff in the action on the bond, as one "having an interest in the subject of the action."
3. **BANK: Assignment to Trust Company: Statute.** The statute (Sec. 1084, R. S. 1909) does not prohibit a bank from assigning its assets to a trust company to liquidate its affairs and effect its retirement from business. On the contrary, it encourages such course, as an appropriate agency for carrying out the purpose, in an expeditious and inexpensive way, beneficial to both creditors and stockholders.
4. _____: _____: _____: **Improper Plaintiff: Pleading.** To authorize the sureties on the bond of a cashier to interpose the defense that an assignment by a bank to a trust company for the purpose of liquidation was unlawful because the statute requires the Bank Commissioner to take charge of a bank in a "failing condition" and forbids such a bank to "make a voluntary general assignment," it develops upon them when sued on the bond to plead it. The point that a petition, alleging that the plaintiff trust company is the assignee of all the assets of the bank, shows on its face that such company is an improper plaintiff, cannot be sustained upon a demurrer thereto.
5. **BOND: Ambiguity: Aliunde Interpretation.** The bond given by a cashier of a bank for efficient service constitutes a contract, and as such is subject to the rules of interpretation applicable to other contracts. If it be ambiguous, the court will look, not merely to its terms, but to its subject-matter, the circumstances attending its making and the interpretation given it at the time by the parties themselves; but if it be not ambiguous, resort to these extraneous matters is not permitted, and being clear in its terms it will, as to accommodation sureties, be strictly construed.
6. _____: _____: **Obligation Against Mistakes But Not Against Peculations.** The bond of the cashier of a bank read that if he "shall well and faithfully perform all duties as such cashier" of said bank "the above named and undersigned sureties hereby agree to hold said bank harmless for any loss occasioned by any act of such officer until all of his accounts with such bank have been paid." *Held*, not to be ambiguous, and while not such a bond as is required by the statute, is neither meaningless nor unauthorized, nor preclusive of the taking of a statutory bond, but is an obligation against inadvertence or honest mistakes and as such is binding on the sureties, but it does not cover the cashier's

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peculations and thefts; and the rules of construction, which require that as to accommodation sureties, a bond must be strictly construed and their liability limited to its exact words, forbid the insertion or elimination of words that would render it a statutory bond.

Appeal from Pemiscot Circuit Court.—*Hon. Frank Kelly, Judge.*

AFFIRMED.

Shepard & Reeves and Oliver & Oliver for appellants.

(1) Our statute provides that every action shall be prosecuted in the name of the real party in interest. The Citizens Trust Company, as assignee, has an interest in the bond. Sec. 1729, R. S. 1909; Waterman v. Frank, 21 Mo. 111. (2) There is nothing in section 1084 that prevented the Pemiscot County Bank from doing what it did do, in assigning certain assets and choses in action to its co-plaintiff, the Citizens Trust Company. Section 1084 prohibits a bank that is "receiving deposits" from making a "general assignment of its business and affairs." There is nothing in this petition that can be tortured into an averment that at the time the Pemiscot County Bank assigned certain assets and choses in action to its co-plaintiff, it was "receiving deposits." Nothing of that kind appears anywhere in this petition. The prohibition in the statute is leveled against a bank "receiving deposits" from making a general assignment of its business and affairs. No such state of facts is pleaded in this petition. On the contrary, the petition, in the most direct and positive way, states the purpose of the assignment—to liquidate. Therefore the Citizens Trust Company had the right under the circumstances detailed in this petition, to take and hold by assignment the bond executed by these appellants and to enforce its payment in this suit. (3) The "general assignment" mentioned in Section 1084 is the assignment mentioned in Chapter 8, Section 896 et seq., R. S. 1909. A bank "receiving

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deposits" is prohibited from making that kind of an assignment. Secs. 896, 1084, R. S. 1909. (4) Moreover it does not lie in the mouth of these defendants to raise that question. If the Pemiscot County Bank has violated its charter the State alone has the right to complain. *Goodland v. Bank*, 74 Mo. App. 376. (5) Sec. 1112, R. S. 1909, provides that "the president, cashier, assistant cashier, or any other officer, upon whom the powers of cashier may be imposed by the board of directors, before entering on the duties of their office, shall give good and sufficient bonds, which shall be approved by the board of directors, in writing . . . conditioned that they will well and faithfully perform all the duties of their office, and that they will hold the bank harmless for any loss occasioned by any act of such officer, until all his accounts with the bank shall have been fully settled and satisfied." (6) The phrasing of the bond sued on shows a clear intention on the part of the respondents to comply with Section 1112. It was their purpose to comply with that provision of the statute. They evidently believed they had complied with the provisions of the statute, and the board of directors of the bank evidently believed that the bond tendered contained the statutory conditions required in such a bond. Both sides acted upon the assumption that the bond was regular and the conditions required by the statute were perfectly expressed. The bank examiner evidently thought so as well as the board of directors. The case is made to turn upon this question: "What was the intention of the parties as disclosed by the instrument, read in the light of the surrounding circumstances?" Reason and authority support appellants' contention that the writing sued upon was intended as a bond. *Lionberger v. Krieger*, 88 Mo. 165; *Brandt on Suretyship*, sec. 80; *Beers v. Wolf*, 116 Mo. 184; *Gleason v. Railway*, 112 Mo. App. 116; *Westervelt v. Mohrenstecher*, 34 L. R. A. 479; 5 Cyc. 753, 755; *Richmond v. Woodward*, 32 Vt. 833; *Belch v. Miller*, 32 Mo. App. 387; *Zellars v. Surety Co.*, 210 Mo. 104. (7) A bond is nothing but a written contract. The rule for the construction

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of contracts which prevail over all others, is that the court may put itself in the place of the contracting parties; may consider, in view of all the facts and circumstances surrounding them at the time of the execution of the instrument, what they intended by the terms of their contract, and when their intention is manifest, it must control in the interpretation of the instrument, regardless of inapt expressions or mere technical rules of construction. *Westervelt v. Mohrenstecher*, 76 Fed. 121; *B. & L. Assn. v. Obert*, 169 Mo. 515; *Caldwell v. Layton*, 44 Mo. 222; *Kansas City v. Youmans*, 213 Mo. 151. (8) The omission of the scrivener to insert the word "not" between the words "shall" and "well" in the first line of the last paragraph of the bond (describing the conditions upon which the sureties are liable) gives rise to this suit. Without the word "not" having been written or intended to have been written, there would have been no occasion whatever for the sureties on the bond to have signed it. 5 Cyc. 755.

W. M. Fitch, Assistant Attorney-General, and *J. P. Gilmore, Amici Curiae.*

(1) The bond in suit is a statutory bond required by law of all persons who assume the right to act as cashier of a banking corporation in Missouri. Sec. 1112, R. S. 1909; *Jones v. Newman*, 36 Hun, 634. (2) Where parties have entered into a bond required by law, and the bond is sufficient to show a clear intent on the part of such bondsmen to create the obligation provided in such cases by law, then the obligation is consummated, even though it be necessary in reading said bond to omit some word or to suppress some word in the obligation to fully and clearly express such intent. *Sizemore v. Morrow*, 6 N. C. 54; *Gully v. Gully*, 1 N. C. 20; *Jones v. Newman*, 36 Hun, 634; *Pratt v. Wright*, 13 Grat. (Va.) 175; *Kincannon v. Carroll*, 9 Yerg. (Tenn.) 11; *Hotel Co. v. Encampment Co.*, 140 Ill. 248; *Monmouth Park Assn. v. Iron Works*, 55 N. J. L. 132; *Bettman v. Harness*, 42 W. Va. 433; *Probate Judge v. Ordway*, 23 N. H. 198; *Swain v. Graves*, 8 Cal. 549; *Zellars v. Sure-*

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ty Co., 210 Mo. 86; Hoshaw v. Gullet, 53 Mo. 86; Graves v. McHugh, 58 Mo. 499; Flint ex rel. v. Young, 70 Mo. 221; State to use v. Berry, 12 Mo. 377; Newton v. Cox, 76 Mo. 352; Wimpey v. Evans, 84 Mo. 144. (3) "It is a rule of construction that the promisor is bound according to the sense in which he apprehended that the promisee received his proposition." Counts v. Medley, 163 Mo. App. 546; Bruner v. Wheaton, 46 Mo. 363. (4) "It has been settled since an early day in this State that common sense and good faith are the leading characteristics of all interpretations." Counts v. Medley, 163 Mo. App. 546; Fenton v. Perkins, 3 Mo. 23. (5) "Where there is room for construction, a contract should not be interpreted so as to give an unfair advantage to one of the parties to it over the other." Counts v. Medley, 163 Mo. App. 546; McManus v. Fair Co., 60 Mo. App. 216; Lumber Co. v. Dent, 151 Mo. App. 614. (6) Where one construction will destroy a contract and another construction will make it valid, and the party trying to destroy the contract is the party giving it, and who wrote it, then the court should so construe the contract as to be valid. 9 Cyc. 586, and note 36; Ferry Co. v. Railroad, 128 Mo. 224. (7) Where the contract contains no specific provision on a given point, or its terms are ambiguous, the construction placed upon the contract by the parties to it will control. Ins. Co. v. Dutcher, 95 U. S. 269; Reed v. Ins. Co., 95 U. S. 23; District of Columbia v. Gallagher, 124 U. S. 527; Jones v. De Lassus, 84 Mo. 541; Gas Light Co. v. St. Louis, 46 Mo. 121; Rose v. Carbonating Co., 60 Mo. App. 28; Mathews v. Danahy, 26 Mo. App. 660; Depot Co. v. Railway, 131 Mo. 291; Work v. Welch, 160 Ill. 468; Street v. Storage Co., 157 Ill. 605; Mohr v. McKenzie, 60 Ill. App. 575; 2 Page on Contracts, secs. 1126-1127; 9 Cyc. 588; Sattler v. Hallock, 160 N. Y. 291; Vincennes v. Light Co., 132 Ind. 114; Robbins v. Kimball, 55 Ark. 414; Katz v. Bedford, 77 Cal. 319; Railroad v. Anderson, 11 Colo. 293; Brigham v. Ross, 55 Conn. 373; Pratt v. Prouty, 104 Iowa, 419; Mitchell v. Wedderburn, 68 Md. 139. (8) The legal effect of a contract or bond does not depend upon its being punctuated correctly. 2 Page on Con-

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tracts, sec. 1124; Ketcham v. Spurlock, 34 W. Va. 597; Homer v. Ins. Co., 98 Fed. 240, 39 C. C. A. 45. (9) In case this court should hold the bond in suit insufficient as a statutory bond then the court must hold it good as a common-law bond. State ex rel. v. O'Gorman, 75 Mo. 370; Grant v. Brotherton, 70 Mo. 458; Waltermann v. Frank, 21 Mo. 108; State ex rel. v. Sappington, 67 Mo. 529. (10) The rights of the sureties are not changed by the construction of the bond contended for by appellants. (11) Where an obligation has been created, then the law will put it beyond the power of the party who assumes the obligation to avoid it. Page v. Cook, 28 L. R. A. 759; McCarty v. Howell, 24 Ill. 341; Harlow v. Boswell, 15 Ill. 56; Eaton v. Yarborough, 19 Ga. 82; Lewis v. Tipton, 10 Ohio St. 88; Crooker v. Holmes, 65 Me. 195; Walters v. McBee, 1 Lea (Tenn.), 364.

Ward & Collins and John E. Kane for respondents.

(1) The Citizens Trust Company, as assignee, is improper party to this suit. "Every action shall be prosecuted in the name of the real party in interest." Sec. 1729, R. S. 1909; Dickey v. Porter, 203 Mo. 24; Citizens Bank v. Burris, 178 Mo. 73; Van Stewart v. Miles, 105 Mo. App. 246. Here the suit was brought first as the liquidating agent, but a suit in this State cannot be brought in the name of an agent or trustee. Draper v. Faris, 56 Mo. App. 419; Furniture Co. v. Radditz, 28 Mo. App. 213. (2) There is nothing in the petition to show any authority in Pemiscot County Bank to bring this suit, but the petition shows that the Citizens Trust Company had the legal title, but that showing is contrary to law, so there is a misjoinder of parties plaintiff, and this misjoinder of parties plaintiff must be taken advantage of by demurrer when it is shown on the face of the petition as in this case. Sec. 1800, R. S. 1909; Fulwider v. Trenton Gas Co., 216 Mo. 582; Daugherty v. Burgess, 118 Mo. App. 557; Taber v. Wilson, 34 Mo. App. 94; Ragan v. Railroad, 111 Mo. 456; 5 Cyc. 823-824. "Where there are several joint owners of property they

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should all join or be joined in an action, but where the whole title is in one party it is a misjoinder to make other parties who have no interest in the subject-matter parties plaintiff." *Walker v. Lewis*, 140 Mo. App. 31; *Little v. Harrington*, 71 Mo. 390; *Butler v. Boynton*, 117 Mo. App. 462; *Stewart v. Gruder*, 105 Mo. App. 247. "A misjoinder of parties plaintiff is cause for demurrer." *Akins v. Hicks*, 109 Mo. App. 99. (3) Section 1081 does not authorize the assignment pleaded in this petition to the Citizens Trust Company as liquidating agent. (4) Section 1084, R. S. Mo. 1909, prevents banks from making general assignments, and does apply to this bank. *Keaton v. Jorndt*, 220 Mo. 117. There is nothing in the petition to show that the alleged assignment of all the Pemiscot County Bank's property was at a time when the bank was not receiving deposits. (5) Appellant contends that nobody can take advantage of this illegal assignment except the State. There can be no reason, rule or authority for that statement. The plaintiff must show some authority in itself to institute an action and that authority must be shown in the petition. (6) If there are two constructions that can be given to the bond then there is some room for construction by the court, but in this bond there are no two constructions that can be given to it. If the bond is ambiguous, then the court calls upon the surrounding circumstances to interpret what is meant by its ambiguity. Of course, the intention of the parties must be looked to in every bond; but the intention of the parties must be gathered from the instrument itself and appellant cannot go outside and uphold this instrument as binding upon a theory not expressed in the bond because the board of directors believed that the bond was a statutory bond or because the bank examiners thought the bond different from what it was. The law is that the "sureties stand upon the narrow domain of restricted liability and point with unshaken confidence to the strict letter of his contract." *Lionberger v. Krieger*, 88 Mo. 160; *Gleason v. Railway*, 112 Mo. App. 117; *Westervelt v. Mohrenstretcher*, 34 L. R. A. 477. "Sureties are favorites of the law and have

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the right to stand upon the strict terms of their contract." Brant on Suretyship, sec. 97; Bayliss on Sureties, 144, 145, 260; State ex rel. v. Smith, 173 Mo. 406; Hill v. Keller, 157 Mo. App. 717; State v. Madery, 17 Ohio, 565; Nofsinger v. Hartnett, 84 Mo. 552. Respondents contract here that they would hold the bank harmless if Tindle would well and faithfully perform all his duties as cashier. See Nofsinger v. Hartnett, 84 Mo. 552. This case has been quoted and approved by the following cases and many others: Lionberger v. Krieger, 88 Mo. 160; State ex rel. v. Smith, 173 Mo. 398; Hill v. Keller, 157 Mo. App. 710; State ex rel. v. May, 160 S. W. 1030; Uterson v. Elmore, 154 Mo. App. 646; Reissaus v. Whites, 128 Mo. App. 143; Martin v. Whites, 128 Mo. App. 120.

WALKER, J.—This is a suit to recover on a bond of respondent, A. C. Tindle, for losses to the plaintiff bank on account of the embezzlement of its funds by Tindle as its cashier. The plaintiff trust company sues as assignee for the purpose of liquidating the assets of the bank of which the bond is a part. The defendants, other than Tindle, are the sureties on his bond.

The petition states the corporate capacity of the plaintiff trust company, its rights, powers and privileges as such, and that it acquired for value received by contracts as assignee, all assets and claims of the Pemiscot County Bank for the purpose of liquidating the bank's unsettled business; that by virtue of said assignment it became a trustee of an express trust for said bank and as assignee in connection with said bank it brings this suit.

The corporate character of the plaintiff bank is alleged; that it did a banking business from the date of its organization until June, 1913, when it ceased to be an active concern, at which time it assigned its assets to the plaintiff trust company for the purpose above stated; that in April, 1912, defendant Tindle was elected and employed as cashier of said bank, and on said date entered into a bond to said bank with the other defendants named herein, as sureties, for his faithful performance of the duties of cashier. The bond is

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then set forth *in haec verba*. The parts material to a determination of the issues here submitted are as follows. That Tindle, as principal, and the defendants, as sureties, naming them, are "indebted to the Pemiscot County Bank of Carruthersville, Missouri, in the penal sum of twenty thousand dollars, for the payment whereof, we and each of us bind ourselves, our heirs, executors and administrators, and every of them jointly, severally and firmly."

"The condition of the above obligation is, that whereas said A. C. Tindle, has been duly appointed by the board of directors of said Pemiscot County Bank, as cashier of said bank;

"Now, Therefore, if the said A. C. Tindle, shall well and faithfully perform all duties of the office of cashier of the said Pemiscot County Bank, respectfully, during the time for which he has been elected or appointed, the said above named and undersigned sureties hereby agree to hold the said Pemiscot County Bank harmless for any loss occasioned by any act of such officer, until all his accounts with the said bank shall have been fully settled and satisfied. It hereby being expressly understood and agreed, that the said sureties shall not be liable for any act of the said employee or employees resulting in loss to the said employer, whose act may have been committed prior to twelve o'clock noon on the 1st day of February, 1912, and subsequent to twelve o'clock noon of the first day of February, 1913."

The petition further avers that Tindle, as cashier of said bank, aided and assisted by Thos. B. Ward and L. A. Ferguson, as assistant cashiers, colluded and worked together with the fraudulent design of embezzling and misappropriating the money and funds of said bank. The course pursued by these parties to effect their purpose and plan to embezzle and misappropriate said money and funds is set forth, and it is alleged that said bank was unlawfully thus deprived by Tindle of large sums of money; that it was the duty of Tindle as cashier to see that the books of said bank were correctly kept to prevent those assisting him or

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in his employment from making false or fraudulent entries in the books of said bank whereby the funds of same might be embezzled and misappropriated; that Tindle failed to thus discharge his duties as cashier; and while acting as same fraudulently embezzled and appropriated to his own use several hundred thousand dollars of money and property of said bank; and that said bank thereby lost all of said sums of money. Then follows a statement of the nature, character and amounts of these numerous embezzlements, which aggregate more than the penalty of said bond. The commission of the acts charged are alleged to have been done by said Tindle while he was acting as cashier of said bank and within the line of his duty as cashier and during the time covered by his bond, to-wit, between the first day of February, 1912, and the first day of February, 1913; and that his acts and misconduct constitute breaches of said bond; that defendants and each of them have failed and refused and still fail and refuse to account for and turn over the Pemiscot County Bank said sums of money herein set forth as having been embezzled, which said sums were then and there the money and property of said bank. Wherefore the plaintiffs pray judgment against defendants for twenty thousand dollars, the penalty of said bond, and that execution issue against defendants for the said sum as a part of the damages aforesaid.

Defendants demurred to this petition, assigning the following reasons therefor:

“1. Because said petition shows on its face that the plaintiff has no legal capacity to bring this suit.

“2. Because said petition shows on its face that said plaintiff is not the party in interest herein, and the suit cannot be maintained in the name of the plaintiff Citizens Trust Company.

“3. Because said petition fails to state facts sufficient to constitute any cause of action herein.

“4. Because said petition shows on its face that the plaintiff has no cause of action against the defendants.

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"5. Because said petition is so indefinite and uncertain as not to apprise the defendants of their alleged cause of action or charge against the defendants.

"6. Because said amended petition shows on its face that the many divers and various things set out and enumerated therein did not constitute any breach of the bond and said petition fails to show any connection of any of the alleged many and divers matters and things set out in said petition are in any way connected or related to these defendants herein, or that said matters therein related and set out constituted any cause of action against the defendants herein.

"7. And that said petition on its face shows, as to these defendants as sureties on the alleged bond, that all matters and things related in said petition did not constitute any breach of the bond set out in plaintiff's petition, and did not constitute any cause of action or ground of complaint against these defendants.

"8. And that said amended petition shows on its face that there is a misjoinder of causes of action of many and divers and various and different alleged wrongful transactions on the part of the principal in the bond sued upon, A. C. Tindle, but which said charges do not constitute any violation of the bond and are alleged wrongful acts not properly joined in this action and do not constitute any cause of action against these defendants.

"9. And there is a misjoinder of parties plaintiff therein."

The demurrer was sustained; and the plaintiff declining to plead further, final judgment was entered for defendant from which this appeal is taken.

I. It is urged as one of the reasons to support the action of the trial court in sustaining the demurrer that the Citizens Trust Company was not a proper party plaintiff. We are not impressed with the sound-

^{Parties Plaintiff.} ness of this contention. The plaintiff alleges that the Trust Company acquired from the bank by assignment all of the assets, includ-

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ing choses in action, claims and demands, due or to become due said bank, to be collected by the trust company and applied to the use of the bank. This contract of assignment constituted the trust company a trustee of an express trust. As such, it was authorized to sue in its own name. [Sec. 1730, R. S. 1909.] This authority, however, did not preclude the trust company from joining the bank therewith as a party plaintiff as one "having an interest in the subject of the action." [Sec. 1731, R. S. 1909; Jones v. Railway, 178 Mo. 528; Lee v. Railway, 195 Mo. 400.] If, therefore, the bond can be made the basis of a cause of action under the allegations of this petition, the trust company was not without authority to sue and there was no misjoinder.

II. It is further contended that the assignment was unauthorized and hence the trust company could not base a right of action thereon. Section 1084, Revised Statutes 1909, is cited in support of this contention. It is as follows: "It shall be unlawful in this State for a bank, private banker, savings and safe deposit company or trust company receiving deposits to make a voluntary general assignment of its business and affairs. In case it shall find itself to be in a failing condition it shall immediately place itself in the hands of the Bank Commissioner. Any deed of voluntary general assignment executed by any such bank, private banker, savings and safe deposit company or trust company shall be null and void, and in case the officers or directors of any such institution shall endeavor to make any voluntary general assignment of its assets, the Bank Commissioner shall immediately take possession thereof and proceed, as provided in the case of insolvent banks in this State for the appointment of a receiver by court. All transfers of the notes, bonds, bills of exchange, or other evidence of debt owing to any bank, private banker, savings and safe deposit company or trust company, or of deposits to its credit; all assignments of mortgages, sureties on real estate or of judgments or decrees in its favor; all deposits of

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money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to it, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, shall be utterly null and void. No attachment, injunction or execution shall be issued against such bank, private banker, savings and safe deposit company or trust company or its property, before final judgment in any suit, action or proceeding in any state, county or municipal court." The prohibition contained in this section is limited to such banks as "find themselves in a failing condition." This limitation if not express in its terms is indicative of a legislative purpose to prohibit insolvent banks from liquidating their business under the general law (Sec. 896, R. S. 1909) authorizing voluntary assignments for the benefit of creditors and to confine them, not exclusively, but for the purpose indicated in Section 1084, to the jurisdiction of the State Banking Department. Not only the provisions of this section but of Section 1081 confirm this conclusion. The confining of the supervision and liquidation of insolvent banks to the State Banking Department was primarily for the purpose of securing an honest and economical administration of the assets and not for the purpose of taking them from the possession of the owners of same when all of such owners, as is the case here, having any possible interest in the funds, desire to take them into their own possession and distribute them. Deprived of this right with no appreciable benefit to be derived therefrom was not the purpose of the statute, especially when such change of possession and supervision could only result in otherwise unnecessary expense and consequent loss. Thus construed, the act, instead of prohibiting, encourages creditors and stockholders, combining and contributing their aid for the benefit of all, and acting through an agency, appropriate and effec-

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tive for that purpose, to liquidate a bank's affairs and retire it from business. No more effective instrumentality to satisfactorily accomplish such liquidation could be employed than a trust company working under the supervision of the State Banking Department. Much of the delay and the costs incident to a liquidation in court are avoided by pursuing this course. Persuasive at least of the correctness of this conclusion is the fact that the Attorney-General appears here as the friend of the court, not to object to the plan, but to register his approval of same by showing that it has been acquiesced in by the stockholders and depositors and that through its processes the individual and unsecured depositors have been paid. The objectors to the plan are the principal in this bond, through whose criminality these peculations were perpetrated, and the sureties on his bond.

From the allegation of the petition therefore in regard to the transfer of this bond to the trust company as a liquidating agency the presumption is permissible that circumstances existed which, in accordance with the views we have expressed, authorized the bank, with the consent of all its creditors to proceed with its own liquidation through the agency of the trust company. If this be denied and the respondents should claim that they have the right to assert that the transfer was unlawful, it devolved upon them to plead it by answer as a defense, which has not been done. The judgment of the circuit court upon the demurrer cannot therefore be sustained on the ground that the trust company is shown upon the face of the petition to be an improper party on account of the transfer of the bond sued on being void.

III. The vital question in this case is, whether under the conditions of this bond the sureties thereon are liable for the thefts of the bank's funds by the principal, as disclosed in the petition. This bond constitutes a contract. As such it is generally subject to the rules of construction applicable to other contracts. One of the most important of these is that if the contract be

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ambiguous, the court will look not merely to its words, but to its subject-matter, the circumstances attending its making and the interpretation given to it at the time by the parties themselves. [5 Cyc. 755, and cases.] The condition precedently necessary to the application of this rule is ambiguity. The reason therefor is evident. If the bond be not fair on its face, it will require other help than its own terms to define its purpose. A resort, therefore, to any of the methods mentioned may become necessary to render its meaning unequivocal. [Bank v. Flanagan Mills & Elevator Co., 268 Mo. l. c. 570.] When, however, the terms of the instrument are so clear that its meaning cannot be mistaken, a resort to any of these aids to interpretation becomes not only ulterior but unnecessary. An instrument which speaks unmistakably in its own words leaves no room for construction. [St. Louis v. Railroad, 228 Mo. 712; Counts v. Medley, 163 Mo. App. l. c. 555.] But abstract reasoning aside, let the conditions of this instrument speak for themselves. They are: "That if the said A. C. Tindle shall well and faithfully perform all duties as such cashier of said Pemiscot County Bank *respectfully*, during the time for which he has been elected or appointed, the above named and undersigned sureties hereby agree to hold said Pemiscot County Bank harmless for any loss occasioned by any act of such officer until all of his accounts with said bank shall have been paid." This condition, measured by its words which from their terseness are ample and sufficiently definite to define their meaning, ignoring the improper use of the word "*respectfully*," which is superfluous, is, that the sureties will hold the bank harmless if the principal well and faithfully performs all of his duties as cashier. That this is not such a bond as is required of a bank cashier by the statute is evident (Sec. 1112, R. S. 1909); but this will not render it either absurd, meaningless or unauthorized, nor did it preclude in addition the taking of a statutory bond. [Bank v. Smith, 5 Allen (Mass.), 413.] Inadvertence or the honest mistakes of cashiers sometimes occasion losses which an obligation

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of the nature of this bond may reasonably be construed to be intended to obviate. They are not infrequent or inconsiderable. Cashing forged checks, buying notes having forged signatures thereon, taking counterfeit money, making a loan in good faith thinking the sureties solvent, paying an obligation to an insolvent employee which had theretofore been paid, are some of the instances of inadvertent or honestly incurred losses occasioned by the acts of cashiers. The enumeration of others is unnecessary as these will suffice to demonstrate that the taking of the character of bond here under review is neither absurd nor meaningless, but serves a wise and practical purpose in the conduct of the business of banking. A bond to protect against this character of losses being authorized, a petition based thereon will state a substantial cause of action. It is, therefor, for the purposes for which it was executed, binding not only upon the principal, but upon those who are in privity with him, to wit, his sureties. [State to use v. Cochrane, 264 Mo. l. c. 593, and cases.] An attempt, however, to render this a statutory bond by the elimination therefrom or the insertion therein of a word or words which will effect a change in its purpose or meaning and thereby render the sureties liable is not authorized.

The necessity and the wisdom of a bond of this character having been shown, its failure to conform to the statutory requirements will not affect its validity for the purpose for which it was made. It was voluntarily entered into, and its conditions may be performed without a breach of the law. The sureties are therefore bound by the terms of their agreement, as recited in the bond, except as to such parts as may be illegal when their responsibility will continue as to the residue. [Daniels v. Tearney, 102 U. S. l. c. 420; Kountze v. Hotel Co., 107 U. S. l. c. 396; Liggett v. Humphrey, 21 How. (U. S.) l. c. 69.]

This reasoning is based upon the general rules of construction applicable alike to all obligations. When, however, the rights of sureties are involved, the doc-

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trine of *strictissimi juris* may properly be invoked in construing the contract—this of course, when it is otherwise clear, plain and its meaning unmistakable. [State ex rel. v. Smith, 173 Mo. l. c. 407.] It is elementary, and does not admit of question, that the reason underlying the application of this limitation to the general rule of construction is that sureties are the favorites of the law. In Blair v. Insurance Co., 10 Mo. l. c. 566, this court first gave judicial recognition to this doctrine. This classification of sureties cannot be better defined than in the words of SHERWOOD, J., speaking for this Court in Nofsinger v. Hartnett, 84 Mo. l. c. 552, where he says in effect, citing numerous cases, that: “It is a well settled rule, both at law and in equity, that a surety is not to be held beyond the precise terms of his contract, and except in certain cases of accident, mistake or fraud, a court of equity will never lend its aid to fix a surety beyond what he is fairly bound to at law. This rule is founded on the most cogent and salutary principles of public policy and justice. In the complicated transactions of civil life, the aid of one friend to another, in the character of surety or bail, becomes requisite at every step. Without these constant acts of mutual kindness and assistance, the course of business and commerce would be prodigiously impeded and disturbed. It becomes then excessively important to have the rule established, that a surety is never to be implicated beyond his specific engagement. Calculating upon the exact extent of that engagement, and having no interest or concern in the subject-matter for which he is surety, he is not to be supposed to bestow his attention to the transaction, and is only to be prepared to meet the contingency when it shall arise, in the time and mode prescribed by his contract. The creditor has no right to increase his risk without his consent, and cannot therefore vary the original contract, for that might vary the risk.” And on page 555 it is said that: “There is a principle that pervades the whole doctrine, on the relation subsisting between the creditor and the security debtor; that is, that the obligation shall by no

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liberal intendment be carried in the smallest degree beyond the undertaking. And again, that there is no moral obligation on the security beyond or superadded to the legal obligation. His obligation being essentially a legal one, it would follow that if not liable in strict law, he is not liable at all. . . . The measure of the liability of sureties is fixed by the terms of the instrument they may sign and we do not understand such undertaking can be enlarged or varied by judicial construction. That would impose upon a mere surety obligations he had never assumed and perhaps would have been unwilling to take upon himself." To a like effect see *State ex rel. v. Smith*, 173 Mo. l. c. 406; *State ex rel. Hamilton v. May*, 160 S. W. (Mo. App.) l. c. 1031; *Dougherty-Moss Lumber Co. v. Churchill*, 104 S. W. (Mo. App.) 478; *Mix v. Singleton*, 86 Ill. 194; *State v. Medary*, 17 Ohio, 565.

This bond speaks for itself. Thus speaking the liability of the sureties thereon is limited to its exact words. If these will not render them liable, nothing can. There is no equity against sureties and courts will not so construe a bond as to create a liability at variance with its letter. Such a construction would be necessary to fix the liability of the sureties here, under the allegations of this petition. We therefore hold that it does not state a cause of action, from which it follows that the judgment of the trial court should be affirmed. It is so ordered.

All concur, except *Bond* and *Woodson, JJ.*, who dissent; *Faris, J.*, not sitting.

PATRICK F. KELEHER v. E. P. JOHNSON, Administrator of Estate of JOHN B. HENDERSON.

In Banc, December 22, 1917.

1. **APPELLATE JURISDICTION:** Amount in Dispute: Determined by Entire Record. In ascertaining the amount in dispute, in determining appellate jurisdiction, the court is not necessarily bound by

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the statement in the petition, but may go to the whole record to ascertain the fact.

2. ____: ____: Appeal By One Partner After Assignment By Other. Where one of the two partners assigned his interest in the claim to defendant and the trial court rendered judgment against him and he did not appeal, and the greatest amount, including interest, which the remaining partner could have recovered under his theory of the case was \$5813.36, and defendant does not plead a counter-claim, nor seek affirmative relief, but raises only such issues as would if allowed defeat plaintiff's right to recover, the Supreme Court does not have appellate jurisdiction of the case, although both the remaining partner and defendant appeal, and the case was before the Supreme Court on a former appeal before the courts of appeals were given jurisdiction of causes involving less than \$7,500.

Appeal from St. Louis City Circuit Court.—*Hon. W. M. Kinsey, Judge.*

TRANSFERRED TO ST LOUIS COURT OF APPEALS.

Robert E. Collins for plaintiff.

E. P. Johnson and Barclay, Orthwein & Wallace for defendant.

WILLIAMS, J.—This suit was instituted by Patrick F. Keleher and William C. Little, as plaintiffs, against John B. Henderson, defendant. The petition alleges that while the plaintiffs were doing business as co-partners under the firm name of Keleher & Company they entered into an agreement with the law firm of Henderson (original defendant herein) and Shields, the substance of which agreement was that in consideration of the services of Keleher & Company in procuring, from the holders thereof, certain county bonds and coupons, for the purpose of having said law firm bring suit thereon and reduce to judgment, the said law firm agreed to pay to Keleher & Company fifty per cent of the fees accruing to said law firm by reason of said employment.

Upon the first trial in the circuit court of the city of St. Louis, judgment was rendered against plain-

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tiffs and in favor of defendant on the theory that the contract in suit was champertous and void. From that judgment both plaintiffs appealed to this court, where the judgment was reversed and the cause was remanded. [Keleher and Little v. Henderson, 203 Mo. 498.]

Upon the second trial the court rendered judgment in favor of plaintiff Keleher and against the defendant in the sum of \$1388.81. The trial court also rendered judgment against plaintiff Little upon finding that Little had theretofore assigned his one-half interest in the contract, to the defendant Henderson. From the judgment upon the last trial both the plaintiff Keleher and defendant Henderson appealed, *but plaintiff Little did not appeal* and the judgment as to him became final.

After carefully considering the record before us we have reached the conclusion that we do not have jurisdiction of this appeal and for that reason will limit the statement to such facts as are necessary to an understanding of the jurisdictional question.

Does the "amount in dispute" exceed the sum of \$7500? That is the sole question. From the record it appears that our jurisdiction cannot be based upon any other ground.

In determining the question of the amount in dispute we are not necessarily bound by the statement in the petition, but may go to the whole record to ascertain the true fact. [Vanderberg v. Gas Co., 199 Mo. 455; State ex rel. v. Reynolds, 256 Mo. 710, l. c. 718.]

In determining the amount now in dispute it must be remembered that the Little interest under the contract *is not* here involved, for the reason that he did not appeal from the judgment denying him a recovery upon his former one-half interest. The Keleher one-half interest under the contract is alone involved.

Under plaintiff's theory of the case the defendant's law firm received as legal fees under the above arrangement twenty-five per cent of \$43,386.78 (See page 49 of Plaintiff's Brief), or the sum of \$10,846.69. Of this fee plaintiff claims that he and Little were en-

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titled to fifty per cent thereof or in other words \$5,423.34. It is nowhere contended that plaintiff Keleher's share of this amount exceeds one-half thereof or, to-wit, the sum of \$2711.67. If to this amount we add \$3,101, which is six per cent interest on the \$2711.67 from October 17, 1894, to the date of the judgment below (*Construction Company v. Bagley*, 231 Mo. 157, l. c. 162), we have a total of \$5813.36, the greatest amount which plaintiff Keleher under his theory of the case could have recovered.

Defendant does not plead a counter-claim, nor does he seek affirmative relief, but raises only such issues as would, if allowed, defeat the plaintiff's right to a recovery.

It therefore follows that the "amount in dispute" does not exceed the sum of \$7500, and that the cause should be transferred to the St. Louis Court of Appeals. [*Rourke v. Holmes Street Ry. Co.*, 257 Mo. 555.] It is so ordered. All concur.

INDEX.

ABSTRACTS.

1. **Judgment for Defendant.** An abstract of the judgment in the words: "March 4, 1914. Jury returned a verdict for defendant and judgment accordingly for defendant" sufficiently describes a judgment for defendant for purposes of appeal. *Burnett v. Prince*, 68.
2. **Filing Bill of Exceptions.** If the abstract of the record proper shows appellant was granted leave to file a bill of exceptions within a designated time and that before the expiration of that time the bill was allowed and filed, it shows that the bill was "duly filed" within the meaning of those words as used in Rule 31. Ib.

ACCESSORY.

1. **Of Father to Rape of Daughter: Substantial Evidence.** If upon a careful examination of the acts, behavior and language of the father, charged with being an accessory to an assault upon his daughter less than fifteen years of age with intent to rape, it appears to the court that his language may well have been construed to have no other meaning than that the child was to be sent up to the railway boarding car for the purpose and upon a bargain that the cook and his assistant, one or both, might have sexual intercourse with her, and she was sent and the assault made or attempted, the question of the father's guilt becomes an issue for the jury to determine, for these facts constitute substantial evidence. *State v. Gulley*, 484.
2. **_____: No Force.** And though it may well be that neither the said cook, nor his assistant who committed the assault, nor the father, their accomplice, had in mind the use or necessity for force in accomplishing the design of the cook or his assistant to have sexual intercourse with the child, that fact does not mitigate the offense of the father in aiding and abetting the assault, since, the child being under the age of consent, neither force nor the lack of it cuts any figure in the case. Ib.
3. **Before the Fact.** Where the fight which culminated in death came up suddenly, no words passed between defendant and his companion until deceased was stabbed and fell, and when deceased asked a negro woman who was talking with defendant's companion if there was "anything doing" the companion struck deceased and a fight between them began, and defendant without saying or hearing a word stood by with his knife in hand till a favorable opportunity presented itself and then stabbed and killed deceased, no instruction as to accessories before the fact should be given. *State v. Mills*, 526.

ACTIONS.

1. **Mandamus: Action at Law: Discretion.** The extraordinary prerogative writ of mandamus issues from the law side of the court, but it has at least one attribute in common with extraordinary writs of equity jurisdiction, namely, its issuance is within the court's legal discretion. *Smith v. Berryman*, 365.

ACTIONS—Continued.

2. _____: _____: **False Return.** Within the purview of the common law, and of the present statute (Sects. 2547 et seq., R. S. 1909), no recoverable damages accrue to the relator for that he was compelled to bring mandamus, unless the respondent by making a false return, and thereby raising a false issue of fact, as contradistinguished from pure issues of law, puts the relator to vexation and expense in disproving such false issue of fact. The only difference between the common law and statutes in this respect is that at common law damages were assessed in a separate action, but under the statute they may be assessed in the mandamus proceeding or by independent action; but neither at common law could relator, nor under the statute can he, recover damages unless there was or is a false return. *Smith v. Berryman*, 365.

ADMINISTRATION.

1. **Limitations: Ten-Year Statute: Possession of Administrator.** Adverse possession cannot be founded upon a wrongful taking possession of estate lands by the administrator, even though while it was in his possession it was sold to defendant under a void judgment. The administrator has no title to decedent's real estate, and his official position cannot constitute a claim of title, or furnish a basis for adverse possession. *Lewis v. Barnes*, 377.
2. **Trustee: Compensation for Services.** For services rendered by a trustee under a trust which had its origin in a contract made by the testator under a will naming the trustee executor, no compensation can be allowed to him as executor. *Johnston v. Grice*, 423.
3. **Trust Estate: Equitable Mortgage: Trustee as Executor: Listed in Inventory: Title.** The fact that the trustee under a contract by which certain real estate was conveyed to him to reimburse him for moneys paid for the grantor, inventoried, as a part of the grantor's estate, a residuary interest in all the unsold property, upon his qualification as executor under the grantor's will, which named certain persons as residuary legatees, did not affect either the existence or character of the trust, or amount to a transfer of the fee. *Ib.*

APPEALS.

1. **Finding of Facts: By Court Sitting as Jury: Appellate Rule.** The findings of fact by the trial court in a jury-waived law case are attended on appeal with the presumptions of verity which clothe the verdict of a jury, and will not be disturbed if supported by any substantial evidence whatever; but if there is no evidence upon which to base such finding, although no instructions were asked or given and no objections or exceptions were taken at the trial, but the point is saved only in the motion for a new trial, the appellate court will interfere. *In re Lankford Estate*, 1.
2. **Examination of Facts: Appellate Rule.** All the cases are reviewed, and it is held that the rule that has become firmly fixed in this State is: (a) The findings of fact, either general or special, of a trial court sitting in a jury-waived case at law, will have applied to them in the appellate court the same presumptions of verity which attach to the verdict of a jury in a law case; (b) such findings of fact may be examined by the appellate court if the point that there was no sufficient evidence is properly preserved in the motion for a new trial alone; (c) in such cases an examination as to sufficiency of the evidence may be had in the

APPEALS—Continued.

appellate court, whether or not instructions were asked, given or refused; and (d) such examination will extend only to a determination of the single question whether there is any substantial evidence to sustain the finding of the trial court. If there is such substantial evidence, and if such substantial evidence be merely contradictory, or, if the evidence adduced be such that reasonable men may draw therefrom more than one inference to sustain the judgment, or if the evidence offered reasonably tends to sustain the finding made, such finding is absolutely conclusive upon the appellate court, and it cannot interfere therewith; but if there is no substantial evidence to contradict the *prima facie* case made out by plaintiff, the appellate court will reverse the finding made by the trial judge for defendant, and remand the cause for a new trial, with instructions that, if the evidence is not materially changed, the finding be for plaintiff. Ib.

3. **Supplemental Motion for New Trial: Untimely.** Matters attempted to be preserved by a supplemental motion for a new trial filed out of time cannot be considered. *Lamport v. Assurance Corp.*, 19.
4. **Juror: Voir Dire Examination.** If the record leaves in doubt what questions were asked and what actually occurred upon the *voir dire* examination of the juror, his alleged false answers cannot be reviewed on appeal. Ib.
5. **Abstract: Judgment for Defendant.** An abstract of the judgment in the words: "March 4, 1914. Jury returned a verdict for defendant and judgment accordingly for defendant" sufficiently describes a judgment for defendant for purposes of appeal. *Burnett v. Prince*, 68.
6. **—: Filing Bill of Exceptions.** If the abstract of the record proper shows appellant was granted leave to file a bill of exceptions within a designated time and that before the expiration of that time the bill was allowed and filed, it shows that the bill was "duly filed" within the meaning of those words as used in Rule 31. Ib.
7. **Appellate Practice: Weight of Evidence: Value of Property Taken.** In a condemnation proceeding, where substantial evidence of the value of the property taken was offered by both sides, the appellate court is powerless to weigh the evidence and say that the amount of damage found by the trial court sitting as a jury, who made a special finding of facts, was inadequate. *St. Louis v. Railroad*, 80.
8. **Rulings Limited to Adjudication of Appellant's Claims.** On appeal the rulings must be limited to the errors of which appellant complains. So that where plaintiff, who claims, first, as heir of the testator, second, as heir of testator's widow, and, third, as grantee of the life tenant, is the only appellant, the court cannot review the adverse claims of the defendants, who filed cross-bills, and to whom the court adjudged the land in controversy in equal moieties. *Ross v. Church*, 96.
9. **Res Adjudicata: Record of Former Trial: Writ of Error.** Where the Court of Appeals had affirmed the judgment of the trial court rendering judgment for damages against plaintiffs on their bond in a dissolved injunction and had remanded the cause to the circuit court with directions to enter judgment for a designated sum as of a certain date, and the circuit court had complied with that mandate, the interested parties being present, plain-

APPEALS—Continued.

- tiffs cannot, by a writ of error sued out of the Supreme Court to review this last judgment, inject into the case, to aid the writ, the record of the trial which resulted in the judgment from which the appeal was taken to the Court of Appeals, for the issues raised in that trial had become *res adjudicata*, and form no part of the record and proceedings brought up by the writ of error, and hence cannot be reviewed by the Supreme Court. *Barrett v. Stoddard County*, 129.
10. **Appellate Jurisdiction: Nominal Party.** Jurisdiction cannot be conferred by the presence of a merely nominal party. *Ib.*
11. ———: **County as Nominal Party: Motion for Damages on Injunction Bond.** An injunction brought by a bank against the county and another bank to restrain the county treasurer from depositing the county funds in the defendant bank designated as county depository had been dissolved, and on appeal to the Supreme Court the judgment was affirmed. Thereafter upon motion to assess damages on the injunction bond the court rendered judgment for defendant bank in the sum of \$7000, and plaintiffs sued out a writ of error to the Supreme Court. *Held*, that the county was only a nominal party to the proceedings and had no right to file such a motion, because the interest on its deposits, about which the original suit centered, had been paid, and if the revenue laws were involved they were involved only in the original proceeding, which was settled on the former appeal; hence, the Supreme Court has no jurisdiction of the writ of error. *Ib.*
12. **Appellate Jurisdiction: Constitutional Question: Not Raised at Trial.** Unless a constitutional question was both timely raised and decided by the trial court and preserved for review no such question can be considered or decided in the appellate court. A court of appeals is not authorized to transfer a case to the Supreme Court on the ground that to properly determine the case it would be compelled to decide a constitutional question, where no such question had been raised by either party. *Littlefield v. Littlefield*, 163.
13. **Appellate Practice: No Bill of Exceptions: Questions for Adjudication.** Absent a bill of exceptions, the only question for adjudication on appeal is whether or not the judgment is such as could have been made on the pleadings. Whether or not the deed held in judgment was procured by fraud or undue influence, or was without consideration, being questions dependent upon the facts established by the evidence and those facts being absent, cannot be considered. *Growney v. O'Donnell*, 167.
14. **No Counsel for Appellant: Review of Record.** Notwithstanding appellant in a criminal case is not represented by counsel, the appellate court will, following the mandate of the statute, review the record to the extent of ruling any error properly assigned in the motion for a new trial. *State v. Gulley*, 484.
15. **Appellate Practice: Substantial Evidence.** If the acts of defendant were obviously susceptible of the construction that defendant is guilty of the crime charged they constitute substantial evidence of his guilt, and the question of his guilt then becomes one of fact for the jury to decide, and not one of law for the appellate court to determine. *Ib.*
16. **Appellate Jurisdiction: Construction of Federal Statute.** The Supreme Court does not have appellate jurisdiction of a cause wherein a railroad company was fined one thousand dollars for shipping

APPEALS—Continued.

cars of cattle from Iowa into Missouri without having a certificate of inspection attached to the waybill, as provided by Sec. 717, R. S. 1909, on the theory that the Federal law on the subject has supplanted the State statute, and wherein the position of the State is not that the Federal statute is void, or that Congress had no power to pass it, but that it does not cover the subject-matter. The case does not involve the validity of the Federal statute, or the constitutionality of the State statute, but merely the construction of the Federal act. *State v. C. M. & St. P. Ry. Co.*, 520.

17. **Appellate Jurisdiction: Amount in Dispute: Not Considered by Court of Appeals: Decided on Certiorari.** Although the Court of Appeals did not expressly rule that the amount in dispute did not exceed \$7,500, yet if it assumed jurisdiction, the Supreme Court will upon *certiorari*, without reference to harmony of opinions, quash its decision, if the amount in dispute exceed \$7,500. *State ex rel. v. Ellison*, 571.
18. _____: _____: **Appeal from Order Granting New Trial.** It is the amount involved in the appellate court that fixes appellate jurisdiction, and not what may be involved in the trial court on a new trial. Where plaintiff sued for \$10,000 and recovered verdict for \$10,000, and filed a *remititur* for \$2,500, and the plaintiff appealed from an order granting a new trial, the amount in dispute in the appellate court, from the standpoint of both plaintiff and defendant, was \$7,500, and the Court of Appeals had jurisdiction. Ib.
19. **Appellate Jurisdiction: Amount in Dispute: Determined by Entire Record.** In ascertaining the amount in dispute, in determining appellate jurisdiction, the court is not necessarily bound by the statement in the petition, but may go to the whole record to ascertain the fact. *Keleher v. Johnson*, 699.
20. _____: _____: **Appeal by One Partner After Assignment by Other.** Where one of the two partners assigned his interest in the claim to defendant and the trial court rendered judgment against him and he did not appeal, and the greatest amount, including interest, which the remaining partner could have recovered under his theory of the case was \$5813.36, and defendant does not plead a counter-claim, nor seek affirmative relief, but raises only such issues as would if allowed defeat plaintiff's right to recover, the Supreme Court does not have appellate jurisdiction of the case, although both the remaining partner and defendant appeal, and the case was before the Supreme Court on a former appeal before the courts of appeals were given jurisdiction of causes involving less than \$7,500. Ib.

ASSESSOR.

1. **City of St. Louis: City or State Office.** Under the Constitution and statutes of this State and the charter of St. Louis the assessor in said city does not derive his title to the office from the general statutes, as do assessors in other parts of the State, but from the charter framed in harmony with the Constitution. *State ex rel. v. Schramm*, 541.
2. **Proviso Excepting St. Louis Out of General Statute: Enlargement to include Said City.** The proviso of the general statute of 1900 (Sec. 11341, R. S. 1909) requiring the election at "the general election" of a county assessor in "the several counties of this State" (said proviso declaring that "this section shall not apply to the city of St. Louis"), if held to be invalid (not necessary to be decided),

ASSESSOR—Continued.

then the remainder of the act cannot be held to enlarge the territory embraced so as to include said city and so as to authorize the qualified voters of said city to elect an assessor at the general election in November or the Governor to appoint respondent to the office in case they do not so elect. State ex rel. v. Schramm, 541.

3. _____: _____: Intention as Manifested by Proviso. Even though a proviso excepting a part of the State from the operation of a general statute be invalid, yet as it expressly excepts that part, it demonstrates the legislative intention not to apply the general provisions of the statute to the territory so excepted, and for the courts, by eliminating the proviso, to make the remainder apply to the whole State in its entirety, would be to give to the act an effect that is manifestly contrary to that intention, and would be judicial legislation. Ib.
4. _____: _____: Validity of Proviso. In view of the fact that the proviso to the Assessor's Act of 1900 (Sec. 11341, R. S. 1909) expressly excepts the city of St. Louis from the operation of the act, and that the remaining part of the act cannot be enlarged to include the territory of said city or to authorize the Governor to appoint the respondent assessor for said city, it is wholly unnecessary, in a *quo warranto* to oust said appointee, to determine the constitutionality of said proviso. Yet it is certain that if the proviso is void, the whole act is void.

Held, by FARIS, J., that the proviso is not void; that long prior to the adoption of the Constitution of 1875 the city of St. Louis had been excepted from the operation of the general laws governing the election of assessors, and that Constitution did not nullify such exceptions unless they were inconsistent with the city charter or were repealed expressly or by necessary implication by some statute, and there is no such repealing statute, and the exception is embraced in the charter; and that, barring the effect of Section 11 of the Schedule, the Constitution operated with no more potency to repeal an existing special law than it did to repeal a general law; nor does the enactment of a general law *ipso facto* and necessarily repeal a local or special law, but in order to have that effect the two must be in irreconcilable conflict, or the legislative intent to prescribe one single authoritative rule must clearly appear. Ib.

Held, by WALKER, J., concurring, that the general statutes pertaining to the office of assessor would be utterly inapplicable to such an officer in the city of St. Louis, and incapable of enforcement there, and a review of them manifests a steadfast legislative purpose from the time of the adoption of the Constitution of 1875 to the present, to leave the control of the assessment of property to the city charter and ordinances; and, since a ruling that said proviso is invalid would necessitate the amendment of the entire body of the law relating to the duties of the assessor and the assessment of property, and prior to such amendment the city would be without power to assess property for purposes of taxation, the validity of the proviso should be upheld if it can be sustained under any reasonable interpretation.

Held, by WILLIAMS, J., dissenting, with whom GRAVES, C. J., and BLAIR, J., concur, that the proviso to Sec. 11341, R. S. 1909, is unconstitutional, and that the remaining portion of the act constitutes a valid statute complete in itself and is of such character as to justify the belief and presumption that the Legislature would have enacted it even though the proviso had been omitted or its invalidity been known. Ib.

ASSIGNEE OF EXPRESS TRUST. See **Parties to Action.**

ASSUMPTION OF RISKS.

1. **When Possible.** There can be no assumption of risk except in cases in which the relation of master and servant exists. But that relation may be either an express or an implied contract. *Williams v. Pryor*, 613.
2. **What Risks: Duty of Master.** A servant employed to do a given work assumes the ordinary and usual risks incident to such employment. But, that admitted, it still is the duty of the employer to furnish the employee a reasonably safe place in which to perform his work, and reasonably safe tools with which to perform it. Those duties are non-delegable in the sense that the master is always responsible for the faithful performance of them. Ib.
3. **Defective Tool: Question for Jury.** If the tool furnished by the master was not, according to plaintiff's evidence, reasonably safe for the performance of the work assigned by the master to the servant, the question of the master's negligence is one for the jury. Ib.
4. **—: Negligence.** The furnishing of a tool which is not reasonably safe for the performance by the servant of the work assigned to him by the master, is negligence on the part of the master, and the servant does not assume a risk growing out of the master's negligence. Ib.
5. **Patently Defective Tool: Continuing to Use.** If the tool furnished by the master is so patently defective that an ordinarily careful and prudent man would not use it, a use of it by the servant is negligence, but under the Federal law that negligence, being contributory, does not bar a recovery, nor does the servant assume the risk growing out of the master's negligence in furnishing such a tool. Ib.
6. **Common-Law Rule: Use of Glaringly Defective Tool: Contributory Negligence.** In cases in which the doctrine of assumed risk can be invoked such assumed risk must be determined by the common-law rule as that rule has been announced by the Missouri courts, and it is (1) that the servant never assumes a risk that is the outgrowth of the master's negligent act, and (2) that the servant cannot recover on the ground of his own negligence, which in Missouri is denominated contributory negligence, and the use of a glaringly defective tool would be such, but under the Federal statute such contributory negligence does not bar recovery, nor does the servant because of such contributory negligence assume the risk occasioned by the master's negligence. Ib.
7. **Simple-Tool Doctrine.** It is negligence of the master to furnish a tool which is not reasonably safe for use by the servant in the performance of his work, whatever be the character of the tool. In its final analysis the so-called simple-tool doctrine is nothing more than that of contributory negligence, which is no defense under the Federal statute and does not fasten assumption of risk on the servant. Ib.
8. **More Dangerous of Two Methods.** The choosing by the servant of the more dangerous of two methods of performing the work assigned to him, is contributory negligence on his part, and does not defeat his right to recover for injuries which result from the master's negligence in failing to furnish him a reasonably safe tool for the performance of his work. Ib.

AUTOMOBILE.

1. Principal and Agent: Negligence of Driver: Liability of Owner: Presumption. In a suit for damages against the owner of an automobile, for personal injuries due to the negligent driving of the car by the chauffeur, in the absence of the owner, proof that the automobile was owned by the defendant and that the chauffeur was in his general employment raises a presumption that the chauffeur at the time was acting within the scope of his employment and makes a prima-facie case against the owner resting on the presumption. But such presumption takes flight upon the appearance of evidence of real facts to the contrary.
Held, by WOODSON, J., dissenting, that the court cannot hold as a matter of law that the prima-facie case was completely overcome and destroyed by the evidence introduced by defendant, but whether or not it was so destroyed is a question for the jury, whose province it is to determine its credibility and weigh its probative force. *Guthrie v. Holmes*, 215.
2. _____: _____: _____: Failure to Observe Master's Direction. Where the chauffeur was directed to take the automobile to the master's garage, which he could have done in an hour, and instead of doing so spent five hours or more driving over the city before (in a drunken state) he negligently ran the car against plaintiff, there is no presumption that at the time of the accident he was acting within the scope of his employment; but in order to hold his master liable for the damage, positive proof that he was in fact at the time of the accident engaged in the performance of duties for the master was required. *Ib.*
3. _____: _____: _____: Having Car Repaired. The fact that, after the master directed the chauffeur to take the automobile to the garage, the chauffeur, who was an experienced mechanic, discovered a "knock" in the engine and, instead of remedying the defect himself, which he could easily have done, went to the general garage of cars of like manufacture, and there saw and took into his car the man in charge does not establish that such trip was within his duties, even though he had been previously instructed to go to a machine shop and have some parts made. Especially is this true, where the facts show that the chauffeur for the next two hours, after making said trip and before the accident occurred, was engaged in a joy-ride and a drunken debauch. *Ib.*
4. _____: _____: _____: Slight Deviations from Directions. Slight deviations from the master's directions to his chauffeur, or incidental things done by him for his own benefit while in the line of his service for the master, will not destroy the presumption that the regularly employed chauffeur, at the time he negligently ran his automobile against a pedestrian, was acting within the scope of his employment. But the acts of the chauffeur in this case were not slight deviations, nor mere incidents of his employment, but destroyed the presumption. *Ib.*
5. Negligence: Ordinance Speed: Exclusion Harmless Error. If the ordinance fixed a maximum speed of ten miles per hour and there was evidence that plaintiff's taxicab at the time of his injury was being driven by him at the rate of twenty-five or thirty-five miles, and the instruction made ordinary care the measure of plaintiff's duty, it was not harmless but prejudicial error to exclude said ordinance as evidence; for a rate in excess of the ordinance rate was negligence *per se*, and a rate in excess of that speed was contributory negligence and defeated plaintiff's right to recover, and without

AUTOMOBILE—Continued.

such ordinance the jury might find that a rate of even thirty-five miles per hour was ordinary care. *Roper v. Greenspon*, 288.

6. _____: _____: Power of City to Regulate. The Act of 1911 did not expressly or by intendment withdraw from cities the power to regulate the speed of automobiles upon their streets, nor does such act deprive cities of their power to enact valid ordinances providing reasonable speed and other regulations in the use of streets by automobiles. Ib.

BANKS AND BANKING.

1. **County Depositary: Trust Company: Doing General Banking Business.** The powers of a trust company embrace the whole field of legitimate banking, with the one exception of receiving money on deposit without the payment of interest; and if it uniformly pays interest on deposits and otherwise observes legal prescriptions, the county court is not justified in rejecting its bid to become the county depositary on the sole ground that it is engaged in a general banking business. *Denny v. Jefferson County*, 436.
2. _____: _____: **Loaning Money to Director.** A loan of money by a trust company to one of its officers or directors in excess of ten per cent of its capital stock and surplus is not illegal if approved by a majority of the other directors. Ib.
3. **Parties Plaintiff: Suit on Bank Bond: Assignee.** An assignee of all the assets, including choses in action, claims and demands, due or to become due the assignor, to be collected by the assignee and applied to the use of the assignor, is authorized to sue on a bond given by an employee of the assignor as a guaranty of efficient service, since such assignment constituted the assignee the trustee of an express trust. *Trust Co. v. Tindle*, 681.
4. _____: _____: _____: **Misjoinder of Parties.** Nor did such assignment and statutory authority to sue preclude the assignee from joining the assignor as a party plaintiff in the action on the bond, as one "having an interest in the subject of the action." Ib.
5. **Assignment to Trust Company: Statute.** The statute (Sec. 1084, R. S. 1909) does not prohibit a bank from assigning its assets to a trust company to liquidate its affairs and effect its retirement from business. On the contrary, it encourages such course, as an appropriate agency for carrying out the purpose, in an expeditious and inexpensive way, beneficial to both creditors and stockholders. Ib.
6. _____: _____: **Improper Plaintiff: Pleading.** To authorize the sureties on the bond of a cashier to interpose the defense that an assignment by a bank to a trust company for the purpose of liquidation was unlawful because the statute requires the Bank Commissioner to take charge of a bank in a "failing condition" and forbids such a bank to "make a voluntary general assignment," it devolves upon them when sued on the bond to plead it. The point that a petition, alleging that the plaintiff trust company is the assignee of all the assets of the bank, shows on its face that such company is an improper plaintiff, cannot be sustained upon a demurrer thereto. Ib.
7. **Bond: Ambiguity: Aliunde Interpretation.** The bond given by a cashier of a bank for efficient service constitutes a contract, and as such is subject to the rules of interpretation applicable to other contracts. If it be ambiguous, the court will look, not

BANKS AND BANKING—Continued.

merely to its terms, but to its subject-matter, the circumstances attending its making and the interpretation given it at the time by the parties themselves; but if it be not ambiguous, resort to these extraneous matters is not permitted, and being clear in its terms it will, as to accommodation sureties, be strictly construed. *Trust Co. v. Tindle*, 681.

8. ____: ____: **Obligation Against Mistakes But Not Against Peculations.** The bond of the cashier of a bank read that if he "shall well and faithfully perform all duties as such cashier" of said bank "the above named and undersigned sureties hereby agree to hold said bank harmless for any loss occasioned by any act of such officer until all of his accounts with such bank have been paid." *Held*, not to be ambiguous, and while not such a bond as is required by the statute, is neither meaningless nor unauthorized, nor preclusive of the taking of a statutory bond, but is an obligation against inadvertence or honest mistakes and as such is binding on the sureties, but it does not cover the cashier's speculations and thefts; and the rules of construction, which require that as to accommodation sureties, a bond must be strictly construed and their liability limited to its exact words, forbid the insertion or elimination of words that would render it a statutory bond. *Ib.*

BILL OF EXCEPTIONS.

1. **Filing.** If the abstract of the record proper shows appellant was granted leave to file a bill of exceptions within a designated time and that before the expiration of that time the bill was allowed and filed, it shows that the bill was "duly filed" within the meaning of those words as used in Rule 31. *Burnett v. Prince*, 68.
2. **Appellate Practice: No Bill of Exceptions: Questions for Adjudication.** Absent a bill of exceptions, the only question for adjudication on appeal is whether or not the judgment is such as could have been made on the pleadings. Whether or not the deed held in judgment was procured by fraud or undue influence, or was without consideration, being questions dependent upon the facts established by the evidence and those facts being absent, cannot be considered. *Grownay v. O'Donnell*, 167.

BOND.

1. **Parties Plaintiff: Suit on Bank Bond: Assignee.** An assignee of all the assets, including choses in action, claims and demands, due or to become due the assignor, to be collected by the assignee and applied to the use of the assignor, is authorized to sue on a bond given by an employee of the assignor as a guaranty of efficient service, since such assignment constituted the assignee the trustee of an express trust. *Trust Co. v. Tindle*, 681.
2. ____: ____: ____: **Misjoinder of Parties.** Nor did such assignment and statutory authority to sue preclude the assignee from joining the assignor as a party plaintiff in the action on the bond, as one "having an interest in the subject of the action." *Ib.*
3. **Ambiguity: Aliunde Interpretation.** The bond given by a cashier of a bank for efficient service constitutes a contract, and as such is subject to the rules of interpretation applicable to other contracts. If it be ambiguous, the court will look, not merely to its terms, but to its subject-matter, the circumstances attending its making and the interpretation given it at the time by the parties themselves; but if it be not ambiguous, resort to these extraneous matters is

BOND—Continued.

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CAPACITY TO SUE. See Parties to Action.**CARNAL KNOWLEDGE.**

1. **Age of Prosecutrix: Contradictory Evidence by Her: Party to Action.** The prosecutrix testified that at the time of the trial, which occurred April 10, 1917, she was sixteen years of age, and that the act of sexual intercourse occurred February 10, 1916. On cross-examination she testified that she was born on July 9, 1901, and that she was fifteen years old in 1915. *Held* that, her testimony being contradictory on the issue of whether she was between the age of fifteen and eighteen years at the time the act was committed, the question of her age was for the jury. The rule, that where one of the parties to the suit testifies to facts against interest he is bound by such admissions unless avoided by contrary satisfactory evidence given by himself, has no application to the conflicting testimony of a witness not a party to the suit, and consequently no application to the said testimony of prosecutrix. *State v. Weber*, 475.
2. **Evidence: Statutory Rape: Inference from Witness's Refusal to Criminate Himself.** No inference of the existence of the incriminating fact is permitted to be drawn from the witness's claim of his constitutional right to refuse to answer, and therefore the witness's claim of the privilege is not a proper matter of evidence for the jury's consideration. Where Waddle was absent from the State at the date of defendant's trial for statutory rape of a girl between the ages of fifteen and eighteen years and of previous chaste character, it was not error to exclude the testimony of the justice of the peace to the effect that at the preliminary hearing said Waddle was a witness and on being asked if he had had sexual intercourse with prosecutrix he refused to answer on the ground that his answer would incriminate him. Ib.
3. ———: ———: **Chaste Character: Prior Acts of Sexual Intercourse.** In a prosecution of a defendant for carnal knowledge of a girl between the ages of fifteen and eighteen years and of previous chaste character, testimony of prior acts of sexual intercourse with other men is proper, but subsequent acts with them are not material on the question of her previous chaste character or of defendant's guilt. Ib.
4. **Age of Prosecutrix: Testimony of Aunt.** A sister of prosecutrix's mother, and therefore within the purview of the law a member of

CARNAL KNOWLEDGE—Continued.

- the mother's family, which fact in a proper situation renders even hearsay declarations admissible in proof of age and pedigree, is a competent witness to testify as to the age of prosecutrix at the time of the assault with intent to rape. *State v. Gulley*, 484.
5. _____: **Family Bible Record: Cumulative Evidence.** Where prosecutrix's age has not been disputed and has already been shown by two uncontradicted and competent witnesses, the admission in evidence of a bare Bible record showing the name of prosecutrix and the day, month and year of her birth, made by her aunt, among entries relating to the aunt's own children, was so far cumulative as not to constitute reversible error, whether or not the entry was of itself incompetent—a question not determined. *Ib.*
6. **Accessory: Of Father to Rape of Daughter: Substantial Evidence.** If upon a careful examination of the acts, behavior and language of the father, charged with being an accessory to an assault upon his daughter less than fifteen years of age with intent to rape, it appears to the court that his language may well have been construed to have no other meaning than that the child was to be sent up to the railway boarding car for the purpose and upon a bargain that the cook and his assistant, one or both, might have sexual intercourse with her, and she was sent and the assault made or attempted, the question of the father's guilt becomes an issue for the jury to determine, for these facts constitute substantial evidence. *Ib.*
7. _____: _____: **No Force.** And though it may well be that neither the said cook, nor his assistant who committed the assault, nor the father, their accomplice, had in mind the use or necessity for force in accomplishing the design of the cook or his assistant to have sexual intercourse with the child, that fact does not mitigate the offense of the father in aiding and abetting the assault, since, the child being under the age of consent, neither force nor the lack of it cuts any figure in the case. *Ib.*
8. **Statutory Rape: Proof of Force: Not Charged.** The offense denounced by the statute is the unlawful act of sexual intercourse with a female under fifteen years of age, and if force is used in accomplishing the crime, that is a mere immaterial incident, and therefore proof that the act was accomplished by force and against prosecutrix's consent, though force is not charged in the information, is not error. *State v. Bowman*, 491.
9. _____: **Sufficiency of Evidence: No Proof of Force.** Because the testimony of prosecutrix is incredible in one particular, it does not follow that it is incredible in all particulars. Where prosecutrix, under fifteen years of age at the time of the act of sexual intercourse, testified that it was accomplished by force, and defendant denied that it was accomplished at all, the jury may convict, although the evidence is too weak to establish forcible ravishment, if her testimony as to the main fact of carnal knowledge is clear and is corroborated by other circumstances. *Ib.*
10. **Physician's Account Book: Evidence in Independent Criminal Action: Age of Prosecutrix.** The book of a physician, who attended prosecutrix's mother at the time of her birth in another State and made an entry of the charge upon his book, showing the purpose of his visit and the date, and who testifies that he has independent recollection of the occurrence aside from the entry in the book and is certain of the date after having refreshed his memory from the book, is, as a book of account, competent evidence, in a prosecution for statutory rape, of the age of prosecutrix, although the book does not show that the charge was paid. Not only should

CARNAL KNOWLEDGE—Continued.

the physician himself after refreshing his memory from the book, be permitted to testify, but his book is competent evidence to show the date of prosecutrix's birth. Ib.

11. **Defendant as Witness: Cross-Examination As to Extrinsic Occurrences.** In a prosecution for statutory rape, where defendant had testified in his direct examination only as to what occurred on the night the crime is charged to have been committed, it was error for the State to ask him on cross-examination if he had not at previous times been guilty of criminal intimacy with another girl who on that night accompanied him and prosecutrix in the automobile although he answered in the affirmative and was made to give the time and place, since the cross-examination was entirely outside the scope of the direct examination. Ib.
12. **Evidence: Similar Offenses: Intent.** In a prosecution of a defendant for statutory rape, a written extra-judicial admission made by defendant that he had been guilty of criminal intimacy with another girl, is not admissible for the purpose of showing the intent with which defendant committed the act of sexual intercourse with prosecutrix. Ib.

CASHIER'S BOND. See Bond.

CERTIORARI.

1. **To Court of Appeals: Conflict of Opinions: Different Conclusions from Similar Facts.** Where the facts in a case before the Court of Appeals are so similar to the facts in a case previously decided by the Supreme Court as to require that the same rule of law should be applied to the facts of both cases, the Supreme Court will on *certiorari* quash the judgment of the Court of Appeals if the two opinions conflict. *State ex rel. v. Farrington*, 157.
2. **_____: _____: _____: Action on Insurance Policy: Fraudulent Representations: Question for Jury.** The Supreme Court has not ruled that the fraudulent intent of the insured in making misrepresentations as to the value of the goods insured or the extent of the injury must always be submitted to the jury. The rule is that where the evidence is such that the jury may reach a conclusion one way or the other on the question of fraudulent intent, the case must go to the jury; but where the evidence conclusively shows a fraudulent intent in making the misrepresentations a demurrer to the evidence should be sustained. And whether the Court of Appeals was right or wrong in holding that the insured's evidence conclusively showed fraudulent misrepresentations as to material facts by him, their ruling in that respect was not in conflict with any prior ruling of the Supreme Court, and for that reason cannot be quashed by *certiorari*. Ib.
3. **Directed Judgment.** On *certiorari*, issued to a court of appeals on the ground that its opinion therein is contrary to previous rulings of the Supreme Court, the latter court, if it quashes the decision of the other, will not direct a judgment in the case, or tell it what to do when it undertakes to make a new record. The Supreme Court will only uphold or quash the judgment of the court of appeals, presuming that upon questions ruled that court will follow its rulings. *State ex rel. v. Ellison*, 571.
4. **Instruction: Omission of Necessary Element: Cured by Others.** An instruction purporting to cover the whole case and directing a verdict for plaintiff, from which is omitted an element of negli-

CERTIORARI—Continued.

gence necessary to plaintiff's right to recover, cannot be cured by one given for defendant; and a holding by the Court of Appeals that such omitted necessary element is supplied by other instructions given, contravenes certain previous rulings of the Supreme Court, and requires that its decision be quashed.

Held, by BLAIR, J., dissenting, that the Court of Appeals erred in holding that the instruction was erroneous or that it omitted any element necessary to plaintiff's right to recover, and, that being true, its opinion cannot be quashed for that it further erred in holding that the omission was supplied by other instructions given. *State ex rel. v. Ellison*, 571.

5. **Conflict in Decisions: Errors Considered.** In a *certiorari* to have a decision of a court of appeals declared void for that it conflicts with the last previous ruling of the Supreme Court, the scope of review does not extend to any errors of opinion on the part of said court of appeals which do not conflict with the latest previous rulings of the Supreme Court. The Supreme Court, in such case, is not called upon to determine whether the views as expressed by the court of appeals are correct or incorrect, but is only to decide whether they conflict with a controlling decision of its own. *State ex rel. v. Reynolds*, 588.
6. _____: _____: Confined to Majority Opinion. The review by the Supreme Court upon *certiorari* of a decision of a court of appeals alleged to be in conflict with the last previous rulings of the Supreme Court, does not embrace any consideration of the record of the case in the court of appeals further than the same is set forth in its majority opinion under review. *Ib.*

7. _____: _____: Fraud and Deceit: Evidence of Mental Incapacity: Not Pleaded. A ruling by the Court of Appeals that evidence that the plaintiff, in a legal action for fraud and deceit, was a man of weak mentality, inexperienced, over-credulous and unqualified in business dealings, although not pleaded, was admissible under general allegations that defendant knowingly made false and fraudulent representations, with the intent and purpose of deceiving plaintiff and that relying thereon he was deceived and led to enter into the contract, to his damage, is not in conflict with any prior decision of the Supreme Court, for said court has never made any ruling on the point, and, therefore, whether said ruling be right or wrong, the Supreme Court has no jurisdiction, by its writ of *certiorari*, to quash said decision.

Held, by GRAVES, C. J., dissenting, with whom BLAIR and WOODSON, JJ., concur, that the evidence which tended to show that plaintiff was weak-minded not only broadened the issues made by the pleadings but contradicted the terms of plaintiff's petition, since allegations that he contracted with defendant relying upon his false statements carried with them the presumption that plaintiff was mentally normal, and such presumption, or legal inference from the facts pleaded, is just as much a part of the petition as if written therein in express words; and to permit him to prove a weak mentality, not only broadens the pleadings, which is a course condemned by many cases of the Supreme Court, but is a contravention of the solemn admissions of his own pleading, and therefore the ruling of the Court of Appeals should be quashed.

Held, also, that the Supreme Court on *certiorari* is not confined to the suggested conflicts in decisions stated in the briefs, but knowing of other conflicts should act in the interest of harmony of opinions. *Ib.*

CHARTER OF CITY OF ST. LOUIS. See **Assessor**.

CHILDREN OF ADOPTED CHILD. See **Collateral Inheritance Tax**.

CITIES.

1. **Current Expenses: Payment of Debts of Prior Years.** Section 12 of article 10 of the Constitution gives to a city authority to levy the annual maximum rate of taxes for city purposes and to spend it all, as it sees proper, in paying its current expenses of all kinds, and it is beyond the power of the Legislature to divert those current funds to the payment of debts of prior years. *State ex rel. v. Zinc Co.*, 43.
2. **—: —: Extra Tax.** When a city contracts a valid debt for any year, then spends for other purposes its current funds for that year, leaving such debt unpaid, it has the power, if authorized by a two-third vote, to levy a tax in excess of the annual rate for city purposes, in order to pay that debt. *Ib.*
3. **New Debt.** Where by way of a compromise of a judgment against a city for debts due a water company for hydrant rentals, bonds were voted by the people to pay the amount agreed upon, the debt evidenced by the bonds, if not a new debt, was a very different debt from that evidenced by the judgment. *Ib.*
4. **Sufficiency of Tax Bill: Special Tax.** The law does not require that the back tax bill shall state a full and complete cause of action for the tax. It is not necessary to its validity that it show with specific clearness the purposes for which a "special tax" and a "sewer fund tax" were levied. The real matter for consideration is whether the tax imposed under section 12 of article 10 of the Constitution is included in the term "special" tax used in section 11. *Ib.*
5. **Taxation: Agricultural Lands by City: Exemption: Repeal by Legislature.** In the absence of a constitutional inhibition to the contrary (and there was none in the Constitution of 1820), the Legislature was vested with inherent power to repeal a provision in a charter granted by special act of the Legislature in 1853 forbidding the city to levy and collect taxes on lands included within an extension of its corporate boundaries unless and until said lands were laid off into lots. Said act did not create a contractual obligation on the part of the General Assembly to exempt said lands from city taxes, nor an express or implied agreement to refrain from repealing said exemption or amending said act. *State ex rel. v. Hemenway*, 187.
6. **—: —: Subject to Subsequent Laws.** Lands exempt from city taxation by a special charter granted in 1853 became subject to taxation for city purposes after said city became a city of the fourth class, under the general law of taxation relating to cities of such class, there being nothing in the then Constitution or in the act itself which inhibited the General Assembly from making such property subject to city taxes. *Ib.*
7. **—: —: No Exemption by Subsequent Act.** Section 11335, Revised Statutes 1909, does not exempt agricultural or pastoral lands included within the corporate limits of a city which was incorporated by special act of the Legislature in 1845, amended in 1853 so as to include such lands and providing that they were not to be taxed until laid off into lots; and the General Assembly had power, under the Constitution of 1875, to enact said Section 11335, omitting such exemption therefrom. *Ib.*

CITIES—Continued.

8. ———: ———: **Prospective Operation of Constitution of 1875.** The Constitution of 1875 was not intended to be so prospective in its operation as to forbid the Legislature from repealing a provision in the special charter granted to a city in 1853 exempting agricultural lands within its then corporate limits from city taxes. The Constitution in effect declared that the owner of such lands should not after its adoption receive the benefit of any exemption from taxation found in said special charter. *State ex rel. v. Hemenway*, 187.
9. ———: ———: **No Longer Considered Within Corporate Limits.** The fact that agricultural land was brought within the city limits by legislative enactment in 1853, and that the exemption of it from city taxation was one of the inducements for bringing it in, and that subsequently the Constitution and statutes repealed that exemption, valid when made in 1853, do not constitute a sufficient reason for considering the property as no longer within the city's corporate limits. *Ib.*
10. **Independent Causes: Explosion of Dynamite: Substantial Evidence: Question for Jury.** The rule that when the evidence discloses two independent causes of the injury, for one of which defendant is liable and for the other of which he is not, it is incumbent upon the plaintiff to show that the cause for which defendant is liable produced the injury, imposes upon the plaintiff the duty of offering substantial evidence tending to show that the cause for which defendant is liable produced the injury; and that having been done, the jury, under proper instructions, passes upon the question of fact thus involved, just as upon any other such question, and the quantum of evidence necessary to sustain a finding thereon differs not at all from that required on other issues of fact. The appellate court cannot weight conflicting evidence upon such an issue. *Holman v. Clark*, 266.
11. **Explosion of Dynamite: Independent Contractor: Liability of City.** The use of explosives by an independent contractor in the construction of a sewer, of such character as to necessitate blasting, must be foreseen by the city; but such use is lawful, and having in readiness, near the work, dynamite in proper quantities for use in blasting, is neither necessarily nor so palpably dangerous, when managed in the ordinary way, as to constitute a thing inherently dangerous; and if the explosive so held in readiness becomes, in the circumstances of a particular case, a nuisance by reason of the independent contractor's negligence of method, without more, provided he is not incompetent, he alone, and not the city, is liable for injuries resulting from explosions. *Ib.*
12. ———: **Negligence in Storing: Proof of Particular Causal Acts.** In determining, after an explosion, whether or not the independent contractor, engaged in constructing a sewer necessitating blasting, had created a nuisance in the street, the locality, the quantity and manner of keeping must be considered, as well as the nature of the explosive and its liability to accidental explosion; and in deciding whether or not a public nuisance existed in connection with the storage of the material which exploded, the question of the manner in which it was kept may enter into consideration; but when it is once determined upon sufficient evidence that such nuisance was maintained, then no particular causal act directly contributing to the explosion need be shown. *Ib.*
13. ———: **Nuisance on Private Property: Liability of City.** A city is not ordinarily liable for failure to abate a nuisance upon property of a private owner, no injury to the users of the street being

CITIES—Continued.

- threatened, since that is but a failure to exercise a governmental power. Ib.
14. ———: **Nuisance in Street: Maintained by Contractor: Liability of City.** The fact that the independent contractor was engaged in work for the city has nothing to do with the question of whether the city is liable to an owner of property, adjacent to a street, for damages to said property resulting from a nuisance created by said contractor in the street. Ib.
15. ———: ———: ———: ———: **Notice.** In the absence of notice to the city and of facts from which notice can reasonably be inferred, that the contractor, engaged in the construction of a sewer requiring blasting, had taken into the shed erected in the street, in which were a gasoline engine supplied with fuel and used in drilling rock and a large tank containing a reserve supply of gasoline and placed a few feet from the engine, some sticks of dynamite, taken from the usual place of storage near by, which did not explode, the city is not liable in damages for injury to private property abutting on the street, resulting from an explosion in the shed, in which there was no habitual storage of dynamite. Ib.
16. **Automobile Speed: Power of City to Regulate.** The Act of 1911 did not expressly or by intendment withdraw from cities the power to regulate the speed of automobiles upon their streets, nor does such act deprive cities of their power to enact valid ordinances providing reasonable speed and other regulations in the use of streets by automobiles. *Roper v. Greenspon*, 288.
17. **Ordinance Negligence: Unlighted Wagon.** Where defendant's long-reach wagon, loaded with long steel beams, extending some eight feet beyond the hind axle, stalled at the intersection of two streets after nine o'clock at night, they were guilty of ordinance negligence for failure to have lights on the wagon, in obedience to an ordinance requiring all such vehicles, while in use upon the streets between the hours of sunset and sunrise, to "display one or more lights or lanterns on the outside of such vehicles, visible from front and rear," and are liable to the driver of an automobile who saw the wagon, but did not see the steel beams, with which he came in contact, and which were of the same color as the asphalt pavement—unless his right to recover is barred by his contributory negligence in driving at an excessive speed. Ib.
18. **Common-Law Negligence: Blocking Street.** Evidence that a long-reach wagon, loaded with long steel beams, extending some eight feet beyond the hind axle, stalled after nine o'clock at night at the poorly-lighted intersection of two streets; that it sunk down into the asphalt pavement and remained there for thirty minutes or more; that the street which crossed the one in which it was traveling was a continuously used highway; that the wagon and beams blocked the whole of the south side of that highway, which was the side used by automobiles going east, as plaintiff's was; that neither the owners of the wagon nor their servants did anything in the way of performing their duty to the traveling public by way of warning or signals, and that plaintiff's taxicab collided with the steel beams and he was injured, is such evidence of common-law negligence as entitled plaintiff to go to the jury on that issue. Ib.
19. **Public Service Commission: Alteration of Grade Crossings: Delegation of Legislative Power.** It was entirely competent for the

CITIES—Continued.

Legislature to delegate to the Public Service Commission composed of trained experts exclusive power to require the installation, alteration or removal of the crossings of highways by railroads and street railways, and a separation of grades at such crossings, and to prescribe the terms upon which such separations are to be made and the proportions in which the expense shall be divided among the railroad and street railway corporations affected, or between them and the State, county or municipality or other public authority in interest, as it has done. *State ex rel. Ry. Co. v. Pub. Serv. Comm.*, 645.

20. ———: ———: ———: **Modifications of Common Law.** The statute giving to the Public Service Commission "exclusive power" to charge the costs and expenses of the elimination of a street grade-crossing and the restoration of the highway against the street railway or steam railroads affected, or to apportion them among other parties interested, and making it its duty to apportion such costs among such corporations and "the State, county, municipality or other public authority," is but a modification by positive law of the common law, by expanding the principles of the common law so as to fit the conditions arising in social and industrial evolution and to apply them to a fuller and more enlightened justice than was afforded under the narrower enunciations of that law at a time when there were fewer diversities of interest to be affected by the removal of railroad street crossings. Ib.
21. ———: ———: **Reasonable Apportionment of Costs: According to Trackage.** Where the Public Service Commission found the total cost of the removal of dangerous street-level crossings and the restoration of the highways, and subtracted therefrom the estimated consequential damages to private property and apportioned that deduction to the city, and of the balance of \$238,000 apportioned \$203,431 to the steam railroads and \$34,569 to the street railway, using the "trackage basis" plan in making the allotment, principally but not solely, but taking into consideration certain other elements of constructive cost and benefit of the general improvement, and its finding is sustained by the clear preponderance of the relevant testimony as to the proper method of making the apportionments, they will not be held to be unreasonable or unjust, although the street railway company contended throughout that it should be required to pay only the estimated cost of the work to be done within its track zone, which would be materially less than its allotment. Ib.
22. **Reasonableness of Order: Determined Upon Equitable Principles.** The reasonableness and justice of an order of the Public Service Commission will be determined by the court upon a review of all the evidence as in a trial of a suit in equity.
Held, by BLAIR, J., dissenting, with whom WILLIAMS, J., concurs, that, for the reasons stated in *State ex rel. Wabash R. Co. v. Publ. Serv. Com.*, 271 Mo. 155, the court in cases like this does not weigh the evidence as in suits in equity. Ib.

CITY OFFICER. See **Assessor.**

COLLATERAL INHERITANCE TAX.

1. **Children of Adopted Child.** The words "legally adopted children" found in Sec. 309, R. S. 1909, providing that "all property which shall pass by will, or by the intestate laws of this State, other than to or for the use of the father, mother, husband, wife, legally

COLLATERAL INHERITANCE TAX—Continued.

adopted children, or direct lineal descendants of the testator, shall be and is subject to the payment of a collateral inheritance tax," was intended by the Legislature to except from the tax, not only legally adopted children, but the descendants of such children, and the tax cannot be assessed upon bequests to such descendants. *In re Cupples Estate*, 465.

2. _____: **Words of Limitation.** The words "legally adopted children," used in the Collateral Inheritance Tax Act, are not words of limitation, used for the purpose of excluding them from the classification of natural children, but were meant to place them in the same class as the natural children of testator or intestate, and the children of such "legally adopted children" in the same class with his "direct lineal descendants." Ib.
3. **Construction of Statute.** A collateral inheritance tax must be imposed in clear and unambiguous words, and exceptions will be liberally construed in connection with the whole body of the law upon the subject of which it treats. Ib.
4. _____: **Kindred Statutes.** The Collateral Inheritance Tax Statute, in a proceeding to assess the tax against children of testator's legally adopted child, will be construed in connection with the statutes relating to the adoption of children and those regulating descents and distributions of estates of decedents, upon which it depends largely for its operation, and is, to that extent, a part. Ib.
5. _____: _____: **Children of Adopted Child: Heir: Classified as Natural Children.** The statute relating to the adoption of children (Sec. 1671, R. S. 1909) makes a child legally adopted by deed an heir of the adopting parent, with all the incidents of that relation, including the incident of the transmission of the inheritance upon the death of such child; and the Statute of Descents and Distributions (Sec. 332, R. S. 1909) makes no distinction between such an adopted child and a child by birth, but includes the adopted child in the general designation of children, and his or her descendants in the general designation of the descendants of children. Ib.
6. _____: **Descendant.** The word "descendant" used in the statute declaring that a collateral inheritance tax cannot be imposed on the "direct lineal descendant of the testator" includes the lineal descendants of testator's legally adopted child, and cannot be limited to its common law definition, since that has, as has the definition of the word "child," been enlarged by statute to include persons who did not fall within that definition. Ib.
7. **Collateral Kindred: Title to Act.** Neither an adopted daughter nor her children are collateral inheritors, but direct heirs. The title of the act being "an Act to tax collateral inheritances, legacies, gifts and conveyances in certain cases," and as under the Constitution the subject of the act must be clearly expressed in its title, the act cannot be held to impose a tax on a legally adopted daughter or her children, who, by the statutes relating to the adoption of children by deed and the statutes relating to descents and distributions, are not collateral inheritors, but, for purposes of inheritance, are "direct legal descendants" of the adopting parent. Ib.

CONDEMNATION. See **Eminent Domain.**

CONSTITUTIONAL LAW.

1. **City Current Expenses: Payment of Debts of Prior Years.** Section 12 of article 10 of the Constitution gives to a city authority to levy the annual maximum rate of taxes for city purposes and to spend it all, as it sees proper, in paying its current expenses of all kinds, and it is beyond the power of the Legislature to divert those current funds to the payment of debts of prior years. *State ex rel. v. Zinc Co.*, 43.
2. _____: _____: _____: **Extra Tax.** When a city contracts a valid debt for any year, then spends for other purposes its current funds for that year, leaving such debt unpaid, it has the power, if authorized by a two-third vote, to levy a tax in excess of the annual rate for city purposes, in order to pay that debt. *Ib.*
3. _____: **New Debt.** Where by way of a compromise of a judgment against a city for debts due a water company for hydrant rentals, bonds were voted by the people to pay the amount agreed upon, the debt evidenced by the bonds, if not a new debt, was a very different debt from that evidenced by the judgment. *Ib.*
4. **Contempt: Refusing to Testify Before Grand Jury: Constitutional Immunity.** The constitutional provision against self-incrimination will not protect a witness before the grand jury in refusing to tell whether the information he published in his newspaper, that a certain person had been indicted, was obtained from a member of the grand jury or an officer of the court or a witness who had been before them. If any of those persons made a revelation of the information he was guilty of a misdemeanor, but a reporter who listened to the disclosure, or wrote it down, or reported it, was guilty of no offense, and cannot excuse himself from telling the grand jury which one of them gave him the information, on the ground that his answer would tend to incriminate himself—though an answer to an inquiry as to "where he got his information" might do so, but that is not decided, because he did not give his "constitutional rights" as his reason for refusal to answer that question. *Ex parte Holliday*, 108.
5. **Appellate Jurisdiction: Constitutional Question: Not Raised at Trial.** Unless a constitutional question was both timely raised and decided, by the trial court and preserved for review no such question can be considered or decided in the appellate court. A court of appeals is not authorized to transfer a case to the Supreme Court on the ground that to properly determine the case it would be compelled to decide a constitutional question, where no such question had been raised by either party. *Littlefield v. Littlefield*, 163.
6. **Taxation: Agricultural Lands by City: Exemption: Repeal by Legislature.** In the absence of a constitutional inhibition to the contrary (and there was none in the Constitution of 1820), the Legislature was vested with inherent power to repeal a provision in a charter granted by special act of the Legislature in 1853 forbidding the city to levy and collect taxes on lands included within an extension of its corporate boundaries unless and until said lands were laid off into lots. Said act did not create a contractual obligation on the part of the General Assembly to exempt said lands from city taxes, nor an express or implied agreement to refrain from repealing said exemption or amending said act. *State ex rel. v. Hemenway*, 187.
7. _____: _____: _____: **Subject to Subsequent Laws.** Lands exempt from city taxation by a special charter granted in 1853 be-

CONSTITUTIONAL LAW—Continued.

came subject to taxation for city purposes after said city became a city of the fourth class, under the general law of taxation relating to cities of such class, there being nothing in the then Constitution or in the act itself which inhibited the General Assembly from making such property subject to city taxes. Ib.

8. _____: _____: **No Exemption by Subsequent Act.** Section 11335, Revised Statutes 1909, does not exempt agricultural or pastoral lands included within the corporate limits of a city which was incorporated by special act of the Legislature in 1845, amended in 1853 so as to include such lands and providing that they were not to be taxed until laid off into lots; and the General Assembly had power, under the Constitution of 1875, to enact said Section 11335, omitting such exemption therefrom. Ib.
9. _____: _____: **Prospective Operation of Constitution of 1875.** The Constitution of 1875 was not intended to be so prospective in its operation as to forbid the Legislature from repealing a provision in the special charter granted to a city in 1853 exempting agricultural lands within its then corporate limits from city taxes. The Constitution in effect declared that the owner of such lands should not after its adoption receive the benefit of any exemption from taxation found in said special charter. Ib.
10. **Mandamus: Against County Court: By Justice of Peace for Salary: Remedy.** The Act of March 23, 1915, provided for four justices of the peace in townships containing a designated number of inhabitants, to be paid an annual salary of \$2000, payable monthly out of the county treasury. Relator was one of the four in such a township, which was the only one of the designated population in the State. He filed a written claim with the county court for salary then due and demanded payment. The court refused to allow the claim on the ground that there was no law authorizing its allowance. He then brought this suit by mandamus against the county court to compel them to pay his salary. Held, that, though the Legislature may have power to provide for the payment of salaries to justices of the peace out of the county treasury, it cannot take away from the county the right to call in question both the facts and the law on which the payment of such a salary is demanded; and since the question of whether said statute is constitutional is a judicial one, and the statute gives to relator the right to appeal from the action of the county court in refusing to issue the warrant, and he has besides the right to sue the county for his salary, he cannot proceed by mandamus against the county court to enforce that right. *State ex rel. v. Hill*, 206.
11. **Process: In Name of the State.** The provision of the Constitution requiring that "all writs and process shall run in the name of the State of Missouri" is directory and not mandatory in its nature. *Creason v. Yardley*, 279.
12. **Constitutionality: Who May Raise Question.** The court in construing a statute may take a view of it which renders it constitutional, whether or not respondents, being mere officers, have a right to raise the question of constitutionality, even when a contrary construction would render it invalid. *State ex rel. v. West*, 304.
13. **Private Property for Public Use: Judicial Question.** Whether the use to which it is proposed to devote private property by the organization of a drainage district is a public or private use, is a judicial question. Ib.

CONSTITUTIONAL LAW—Continued.

14. ———: **No Hearing.** A statute which would authorize the taking of private property for the use of a drainage district without affording the owner an opportunity to have the question of whether the use is a public or private one judicially determined, would be unconstitutional; and a statute which would compel the county court, upon the presentation of a petition signed by the owners of the majority of the acres in a proposed drainage district, to make an unconditional and final order incorporating such district with powers to construct ditches and levees, and levy taxes on all lands therein to pay for same, with no opportunity on the part of the owners of the remaining acres to be heard on the question of the necessity and public utility of such improvement, would be such a statute. *State ex rel. v. West*, 304.
15. **Refunding Debt: Within Twenty Years After Creation.** A statute authorizing the refunding of an existing indebtedness by the issuance of new bonds is not invalid because it does not require the bonds to be paid within twenty years from the time the debt was originally created. *State ex rel. v. Hackman*, 600.
16. ———: **Sale of Bonds to Original Purchaser.** Under Section 1249, Revised Statutes 1909, a county has the right to refund its public road bonds whenever it can do so at a lower rate of interest, and the refunding bonds are not invalid because they were sold to the purchaser of the original bonds. *Ib.*

CONTEMPT.

1. **Sufficiency of Judgment.** A judgment which sets forth facts conveying definite information of the precise subject-matter under inquiry by the grand jury at the time contemnor refused to answer, is sufficiently certain as to such subject. *Ex parte Hollaway*, 108.
2. **Revealing Secrets of Grand Jury.** Inquiry by the grand jury of a witness as to the source of information he caused to be published in a newspaper, that a certain person had been indicted, who had not been arrested, is a legitimate and proper subject of inquiry by the grand jury. *Ib.*
3. ———: **Reasons for Statute.** The purpose of the statute in requiring the secrets of the grand jury to be kept inviolate and in forbidding a disclosure of the fact that an indictment has been found against a person not in actual confinement or under bail, is to prevent the escape of such person; but the fact that the statute forbids such revelations, is of itself sufficient reason, whether the offense charged be great or small. *Ib.*
4. ———: **Excuse: To Accommodate Newspaper Reporter.** He who violates the command of the statutes forbidding a revelation of the fact that the grand jury has found an indictment against an accused who has not been arrested or bailed, cannot justify his conduct by the fact that the person to whom under the cover of confidential friendship he gave the information was the reporter of a newspaper who desired to "scoop" his competitor in the business of obtaining and printing so-called news. *Ib.*
5. **Refusing to Testify Before Grand Jury: Constitutional Immunity.** The constitutional provision against self-incrimination will not protect a witness before the grand jury in refusing to tell whether the information he published in his newspaper, that a certain person had been indicted, was obtained from a member of

CONTEMPT—Continued.

the grand jury or an officer of the court or a witness who had been before them. If any of those persons made a revelation of the information he was guilty of a misdemeanor, but a reporter who listened to the disclosure, or wrote it down, or reported it, was guilty of no offense, and cannot excuse himself from telling the grand jury which one of them gave him the information, on the ground that his answer would tend to incriminate himself—though an answer to an inquiry as to "where he got his information" might do so, but that is not decided, because he did not give his "constitutional rights" as his reason for refusal to answer that question. Ib.

6. **Term of Commitment: Error Corrected on Habeas Corpus.** The judgment and commitment fixing the punishment of a contemnor, who has been properly adjudged guilty of contemptuously and contumaciously refusing to answer proper questions propounded to him by the grand jury, at imprisonment "until the further order of this court, or until he be otherwise legally discharged by due process of law," is manifestly erroneous, since the statute fixes the duration of punishment till contemnor gives the evidence which he had previously contemptuously refused to give; but he is not on that account entitled, on Habeas Corpus, to his unconditional discharge, but the contempt being criminal, as contradistinguished from civil contempt, the court, under the provisions of the statute (Sec. 5316, R. S. 1909), will assess the proper punishment. Ib.

CONTINUANCE.

Due Diligence. The showing of due diligence on the part of the applicant bears an important part in determining his right to a continuance. Where defendant, after he had learned that a notary public in a near-by State, employed by him for the purpose, had refused to take the deposition of an absent witness, still had ten days before the day already set for the trial in which to take the deposition and made no further attempt to take it, the court did not abuse its discretion in refusing a continuance. *State v. Weber*, 475.

CONTRACTS.

1. **Capacity to Make Deed.** If the grantor had sufficient mental capacity to understand the nature of the particular transaction and with such understanding voluntarily entered into it and consummated it by making a deed, she was not at the time mentally incapable of making the deed. *Bennett v. Ward*, 671.
2. _____: **Use of Morphine: Cancer.** The fact that the grantor, a woman of more than ordinary intelligence and business ability and understanding the reciprocal obligations assumed by the grantee in consideration of the conveyance, was at the time afflicted with cancer and occasionally was given morphine to relieve her suffering, but in no wise rendered irrational either by the disease or opiate, does not establish mental incapacity to make a deed conveying to her brother her home place. Ib.

CONVEYANCES.

1. **By Life Tenant.** A deed by the life tenant conveys to the grantee no such title as will enable him to successfully assert an interest in the land after the life tenant's death. The life tenant's interest terminated upon her death, and cannot be enlarged by her conveyances. *Ross v. Church*, 96.

CONVEYANCES—Continued.

2. _____: **Limitations.** Whatever may have been the character of the holding of the land by the grantee of the life tenant, he cannot claim title by limitations, or defeat the rights of remaindermen, if sufficient time has not elapsed since the life tenant's death to sustain a claim under the Statute of Limitations. *Ross v. Church*, 96.
3. **Homestead: Deed of Husband Alone: Cancellation.** A deed made in 1909 by the husband alone, which conveyed lands of which the unassigned homestead acquired prior to the Act of 1895 was a part, is invalid as to the homestead without the signature of the wife, and as to it may be cancelled as a cloud upon the title, but is not invalid as to the rest of the tract, and as to it may be confirmed. *Grownay v. O'Donnell*, 167.
4. _____: **Definition.** The homestead in the country, as defined in the statute, means the dwelling house and appurtenances and the land used in connection therewith to the extent and value of \$1500, and it includes only so much of the land as (together with the dwelling house and appurtenances) is worth \$1500. It is only as to that homestead that the statute makes void the individual deed of the husband. Ib.
5. _____: **Conveyance by Husband Alone: Valid as to Excess.** A deed signed by the husband alone, who has a living wife, conveying a whole tract owned by him, in which he has an unassigned homestead, is not void as a whole, but is valid as to the excess of land over and above the homestead proper as defined by the statute, subject to the wife's inchoate right of dower in the excess. [Ruling that such question was not involved in *Bushnell v. Loomis*, 234 Mo. 371, and that the decision therein was not intended, in view of the facts held in judgment, to announce a contrary rule.] Ib.
6. **Filing Deed: Date as Shown by Index.** The date the deed was deposited in the office of the Recorder of Deeds, as shown by the "Abstract and Index of Deeds" required by law to be kept, determines the date on which the instrument was filed, and not the certificate on the deed reciting that it was "filed for record" on a subsequent date.
Held, by GRAVES, C. J., concurring, with whom a majority concur, that a deed is filed for record when it is presented to and left with the Recorder of Deeds for record, and the neglect of the Recorder to actually file or record it cannot defeat the rights of a grantee who has actually left it with him for record, and if the Recorder has wilfully or negligently failed to file and record a deed to a homestead oral proof of the fact of its deposit with him is admissible; and, in an action to quiet title, converted by the answer and judgment into a suit in equity, it will be held by the appellate court that a memorandum on the deed in the handwriting of the Recorder reciting that it had been filed in his office on January 6, 1872, and entries in the "direct" and "indirect" parts of the Index Record showing the same date of filing, show a filing on that date, and such fact is not overcome by a certificate attached to the deed and bearing date of July 19, 1872, in which it was stated the instrument was filed on said July 19, 1872, the Deputy Recorder, who made it, testifying that he did not know how the body of the certificate bore the date of July 19, 1872, unless it was a mistake—it being apparent that the deed was filed January 6th, but was not actually recorded until July 19th.

CONVEYANCES—Continued.

Held, by FARIS, J., dissenting, with whom BOND, J., concurs, that, the cause being an action at law, and the substantial evidence as to the date of the filing of the deed being in sharp conflict, it was for the trial court sitting as a jury to determine its probative force, and his finding that it was filed for record on July 19th the appellate court cannot review; and that the announcement in the main opinion that the direct and cross entries in the Index Record take precedence in comparative probative force over a contrary recital in a solemn sealed certificate made by the Recorder both upon the record and the deed itself, is not in consonance with what has been said by this court in a number of cases. *Lewis v. Barnes*, 377.

7. **Delivery of Deed.** Where the scrivener, at grantor's direction, took the deed, drawn according to her instructions, from her residence and delivered it to the grantee and he deposited it in a bank, where it remained until her death, and immediately thereafter grantee appeared with it at the Recorder's office and left it with him for record, the deed was delivered to the grantee. *Bennett v. Ward*, 671.
8. **Capacity to Make Deed.** If the grantor had sufficient mental capacity to understand the nature of the particular transaction and with such understanding voluntarily entered into it and consummated it by making a deed, she was not at the time mentally incapable of making the deed. *Ib.*
9. **—: Use of Morphine: Cancer.** The fact that the grantor, a woman of more than ordinary intelligence and business ability and understanding the reciprocal obligations assumed by the grantee in consideration of the conveyance, was at the time afflicted with cancer and occasionally was given morphine to relieve her suffering, but in no wise rendered irrational either by the disease or opiate, does not establish mental incapacity to make a deed conveying to her brother her home place. *Ib.*
10. **Undue Influence: Power to Arbitrarily Dispose of Property.** The owner of property has unlimited power to alienate it by deed or will, if the act is understandingly done and is free from coercion, fraud, or lack of mental incapacity and undue influence; and this power of arbitrary disposition of a capable and uninfluenced person pertains to absolute ownership, and may be reflected in deeds or wills exhibiting the loves, hates, partialities or caprices of the grantor or testator, which of themselves are not sufficient reasons for annulling the instruments. *Ib.*
11. **—: Meaning.** By undue influence is meant that the conveyance when made did not reflect the grantor's wishes and intentions, but the designs and intentions of some one who controlled the grantor's acts. *Ib.*
12. **—: Preference Among Kindred.** The intention of a childless aged widow to prefer a brother to two sisters in the disposition of her real estate, deliberately and clearly expressed in the deed, is not sufficient to defeat the conveyance, in the absence of evidence that the reason for the preference was extraneous domination of her mind. *Ib.*
13. **—: Fiduciary Relation: Presumption: Acts of Kindness.** The facts that the childless widow, upon being informed by physicians that she was afflicted with cancer which would soon end her life, not

CONVEYANCES—Continued.

wishing to go to a hospital, went to her brother's home and it was there decided that his two daughters would take her to her own home and care for her through her illness, which they did until her death a year later, and that the last three weeks of her life her brother was with her constantly and assisted her in some business transactions which she was unable to attend to, being acts of affection and kindness, do not suffice to create such a fiduciary relation as afford a just basis for a presumption of undue influence on the part of the brother, who was the grantee in the deed made in his absence three months prior to her death, by which after making gifts for the support and education of some minor step-grandchildren, she conveyed, in consideration of his many uncompensated acts of kindness and an agreement that he was to care and provide for her until her death, her real estate to him, to the exclusion of her two married sisters. *Bennett v. Ward*, 671.

14. ———: **Cogent Proof.** In a suit to set aside and annul a deed between competent parties, absent any legal presumptions, the same degree of proof must be adduced as is prescribed by courts of equity when such a conveyance is sought to be annulled or its terms altered by oral evidence. *Ib.*

COUNTIES.

1. **Insane Patient: County Charge.** A state hospital makes out a prima-facie case for a claim against the county by showing that the patient had entered the hospital as a county patient and that the charges for a definite subsequent period had not been paid. *State Hospital v. Cole County*, 135.
2. ———: ———: **Inheritance of Estate: Notice to State Hospital: Evidence That Notice Was Received.** Where the county court made an order reciting that a certain person, theretofore confined in a state hospital as a county patient, had become possessed of an estate sufficient to support himself and family, that the probate court had appointed a guardian to take charge of his person and estate, and ordering that such person be no longer a charge upon the county, a transmission of that order to the hospital, in the manner prescribed by Sec. 1429, R. S. 1909, bars the right of the hospital board to recover from the county for the keep of said patient thereafter; and testimony by the deputy county clerk that on the same or the next day after the order was made he made a certified copy of it, inclosed it in an envelope with the county clerk's return address thereon, sealed it, directed it to the superintendent of the hospital, and mailed it, and that he had a specific recollection of mailing the particular document, is positive evidence that the order was received by the hospital, and sufficient to raise a prima-facie presumption that the superintendent received the copy so sent, and to submit that issue to the jury. *Ib.*
3. **Mandamus: Against County Court: By Justice of Peace for Salary: Remedy.** The Act of March 23, 1915, provided for four justices of the peace in townships containing a designated number of inhabitants, to be paid an annual salary of \$2000, payable monthly out of the county treasury. Relator was one of the four in such a township, which was the only one of the designated population in the State. He filed a written claim with the county court for salary then due and demanded payment. The court refused to allow the claim on the ground that there was no law authorizing its allowance. He then brought this suit by mandamus against the county court to compel them to pay his salary. *Held*, that, though

COUNTIES—Continued.

the Legislature may have power to provide for the payment of salaries to justices of the peace out of the county treasury, it cannot take away from the county the right to call in question both the facts and the law on which the payment of such a salary is demanded; and since the question of whether said statute is constitutional is a judicial one, and the statute gives to relator the right to appeal from the action of the county court in refusing to issue the warrant, and he has besides the right to sue the county for his salary, he cannot proceed by mandamus against the county court to enforce that right. *State ex rel. v. Hill*, 206.

COUNTY DEPOSITORY:

1. **Rejection of Best Bid.** A selection of the lowest of two bidders to become county depositary, which is the result of bad faith, partiality and favoritism on the part of the county court, each bidder being solvent, doing a safe and lawful banking business and of good reputation, is against the best interest of the taxpayers, illegal, and fraudulent within the meaning of the law. *Denny v. Jefferson County*, 436.
2. **—: Trust Company: Doing General Banking Business.** The powers of a trust company embrace the whole field of legitimate banking, with the one exception of receiving money on deposit without the payment of interest; and if it uniformly pays interest on deposits and otherwise observes legal prescriptions, the county court is not justified in rejecting its bid to become the county depositary on the sole ground that it is engaged in a general banking business. *Ib.*
3. **—: —: Loaning Money to Director.** A loan of money by a trust company to one of its officers or directors in excess of ten per cent of its capital stock and surplus is not illegal if approved by a majority of the other directors. *Ib.*
4. **—: Discretion of County Court: Good Faith.** The county court, in determining which is the best bid made by banking institutions to be selected as county depositary, does not exercise judicial discretion, but is a mere administrative agency of the county; and while its official acts carry with them the presumption that it has done its duty, the presumption applies only to acts within its administrative powers done in pursuance of the legislative purpose, and if the power depends on specific facts their existence may always be controverted, and in so far as it is founded on the exercise of judgment it must be exercised in good faith, reasonably and with regard to the legislative purpose. *Ib.*
5. **—: —: Proviso to Statute: Power to Reject All Bids.** The purpose of the statute authorizing the county court to contract with a banking institution for the deposit of county funds (Sec. 3805, R. S. 1909) is to obtain for the public the largest available income from those funds, consistent with their safety and ample security; and the purpose of the proviso, giving to the court the "right to reject any and all bids," was not to give to the court the power to do whatever it might desire to do, but to save from defeat the legislative purpose by preventing combinations of bidders and a division of the funds among themselves in accordance with private agreements, and for use in many other ways in safeguarding the funds; it cannot be used to thwart the legislative purpose and the exercise of good faith which the statute imposes. *Ib.*

COUNTY DEPOSITORY—Continued.

6. **Judgment: Awarding Funds to Unsuccessful Bidder.** In an injunction brought by taxpaying citizens to set aside an order of the county court designating the lowest of two equally solvent and competent bidders as the county depository, and to restrain the county treasurer from depositing the county funds with such bidder, in which neither the State nor any of its prosecuting officers intervene, the circuit court can, for good grounds established, set aside the order and cancel the consequent contract entered into by the county court in pursuance thereto, but having done so it cannot go further and designate the other bidder as county depository and award to it the county funds. *Denny v. Jefferson County*, 436.

COURTS.

Extent of Review: Questions Not Raised Before Commission. A constitutional question injected into a case for the first time on review in the circuit court, namely, that the order of the Public Service Commission requiring the defendant to connect its telephone lines with the lines of a voluntary association, not a public utility, is a taking of property without just compensation and without due process of law, cannot be considered by the court, because not timely raised. *State ex rel. v. Pub. Serv. Comm.*, 627.

COURTS OF APPEALS.

1. **Certiorari to: Conflict of Opinions: Different Conclusions from Similar Facts.** Where the facts in a case before the Court of Appeals are so similar to the facts in a case previously decided by the Supreme Court as to require that the same rule of law should be applied to the facts of both cases, the Supreme Court will on *certiorari* quash the judgment of the Court of Appeals if the two opinions conflict. *State ex rel. v. Farrington*, 157.
2. **_____: _____: _____: Action on Insurance Policy: Fraudulent Representations: Question for Jury.** The Supreme Court has not ruled that the fraudulent intent of the insured in making misrepresentations as to the value of the goods insured or the extent of the injury must always be submitted to the jury. The rule is that where the evidence is such that the jury may reach a conclusion one way or the other on the question of fraudulent intent, the case must go to the jury; but where the evidence conclusively shows a fraudulent intent in making the misrepresentations a demurrer to the evidence should be sustained. And whether the Court of Appeals was right or wrong in holding that the insured's evidence conclusively showed fraudulent misrepresentations as to material facts by him, their ruling in that respect was not in conflict with any prior ruling of the Supreme Court, and for that reason cannot be quashed by *certiorari*. *Ib.*
3. **Appellate Jurisdiction: Amount in Dispute: Not Considered by Court of Appeals: Decided on Certiorari.** Although the Court of Appeals did not expressly rule that the amount in dispute did not exceed \$7,500, yet if it assumed jurisdiction, the Supreme Court will upon *certiorari*, without reference to harmony of opinions, quash its decision if the amount in dispute exceeded \$7,500. *State ex rel. v. Ellison*, 571.
4. **_____: _____: Appeal from Order Granting New Trial.** It is the amount involved in the appellate court that fixes appellate jurisdiction, and not what may be involved in the trial court on a new trial. Where plaintiff sued for \$10,000 and recovered verdict for \$10,000, and filed a *remitititur* for \$2,500, and the plaintiff ap-

COURTS OF APPEALS—Continued.

pealed from an order granting a new trial the amount in dispute in the appellate court from the standpoint of both plaintiff and defendant, was \$7,500, and the Court of Appeals had jurisdiction. Ib.

5. **Certiorari: Directed Judgment.** On *certiorari*, issued to a court of appeals on the ground that its opinion therein is contrary to previous rulings of the Supreme Court, the latter court, if it quashes the decision of the other, will not direct a judgment in the case, or tell it what to do when it undertakes to make a new record. The Supreme Court will only uphold or quash the judgment of the court of appeals, presuming that upon questions ruled that court will follow its rulings. Ib.
6. **Instruction: Omission of Necessary Element: Cured by Others.** An instruction purporting to cover the whole case and directing a verdict for plaintiff, from which is omitted an element of negligence necessary to plaintiff's right to recover, cannot be cured by one given for defendant; and a holding by the Court of Appeals that such omitted necessary element is supplied by other instructions given, contravenes certain previous rulings of the Supreme Court, and requires that its decision be quashed.
Held, by BLAIR, J., dissenting, that the Court of Appeals erred in holding that the instruction was erroneous or that it omitted any element necessary to plaintiff's right to recover, and that being true its opinion cannot be quashed for that it further erred in holding that the omission was supplied by other instructions given. Ib.
7. **Certiorari: Conflict in Decisions: Errors Considered.** In a *certiorari* to have a decision of a court of appeals declared void for that it conflicts with the last previous ruling of the Supreme Court, the scope of review does not extend to any errors of opinion on the part of said court of appeals which do not conflict with the latest previous rulings of the Supreme Court. The Supreme Court, in such case, is not called upon to determine whether the views as expressed by the court of appeals are correct or incorrect, but is only to decide whether they conflict with a controlling decision of its own. *State ex rel. v. Reynolds*, 588.
8. **_____: _____: Confined to Majority Opinion.** The review by the Supreme Court upon *certiorari* of a decision of a court of appeals alleged to be in conflict with the last previous rulings of the Supreme Court, does not embrace any consideration of the record of the case in the court of appeals further than the same is set forth in its majority opinion under review. Ib.
9. **_____: _____: Fraud and Deceit: Evidence of Mental Incapacity: Not Pleaded.** A ruling by the Court of Appeals that evidence that the plaintiff, in a legal action for fraud and deceit, was a man of weak mentality, inexperienced, over-credulous and unqualified in business dealings, although not pleaded, was admissible under general allegations that defendant knowingly made false and fraudulent representations, with the intent and purpose of deceiving plaintiff and that relying thereon he was deceived and led to enter into the contract, to his damage, is not in conflict with any prior decision of the Supreme Court, for said court has never made any ruling on the point, and, therefore, whether said ruling be right or wrong, the Supreme Court has no jurisdiction, by its writ of *certiorari*, to quash said decision.
Held, by GRAVES, C. J., dissenting, with whom BLAIR and WOODSON, JJ., concur, that the evidence which tended to show that plaintiff was weak-minded not only broadened the issues made

COURTS OF APPEALS—Continued.

by the pleadings but contradicted the terms of plaintiff's petition, since allegation that he contracted with defendant relying upon his false statements carried with them the presumption that plaintiff was mentally normal, and such presumption, or legal inference from the facts pleaded, is just as much a part of the petition as if written therein in express words; and to permit him to prove a weak mentality, not only broadens the pleadings, which is a course condemned by many cases of the Supreme Court, but is a contravention of the solemn admissions of his own pleading, and therefore the rulings of the Court of Appeals should be quashed.

Held, also, that the Supreme Court on *certiorari* is not confined to the suggested conflicts in decisions stated in the briefs, but knowing of other conflicts should act in the interest of harmony of opinions. *State ex rel. v. Reynolds*, 588.

CRIMINAL LAW.

1. **Criminal Intent: Presumption: Possession of Property: Corpus Delicti.** The possession by one of the property of another does not raise any presumption, nor is it of itself evidence, that the property was stolen. The possession must be accompanied by other incriminating circumstances, inconsistent with the possessor's innocence. The evidence in this case does not establish beyond a reasonable doubt that the property was stolen or the defendant's guilt. *State v. Lee*, 121.
2. **_____: Instruction: Unexplained Possession of Stolen Property.** The purpose of an instruction on the question of the presumption of guilt arising from the recent unexplained possession of stolen property, is to aid in determining the identity of the felonious taker; and where defendant admits that the hog alleged to have been stolen was by his direction taken from the range and placed in his barn by his hired hands, such an instruction should not be given, since the question at issue is not the identity of the taker, but the intent with which the hog was taken. *Ib.*
3. **_____: _____: Assuming Property Was Stolen.** Where the issue is whether or not the hog found in defendant's possession was stolen, an instruction which assumes that the hog was stolen is erroneous. *Ib.*
4. **Continuance: Due Diligence.** The showing of due diligence on the part of the applicant bears an important part in determining his right to a continuance. Where defendant, after he had learned that a notary public in a near-by State, employed by him for the purpose, had refused to take the deposition of an absent witness, still had ten days before the day already set for the trial in which to take the deposition and made no further attempt to take it, the court did not abuse its discretion in refusing a continuance. *State v. Weber*, 475.
5. **Age of Prosecutrix: Contradictory Evidence by Her: Party to Action.** The prosecutrix testified that at the time of the trial, which occurred April 10, 1917, she was sixteen years of age, and that the act of sexual intercourse occurred February 10, 1916. On cross-examination she testified that she was born on July 9, 1901, and that she was fifteen years old in 1915. *Held*, that, her testimony being contradictory on the issue of whether she was between the age of fifteen and eighteen years at the time the act was committed, the question of her age was for the jury. The rule, that where one of the parties to the suit testifies to facts

CRIMINAL LAW—Continued.

against interest he is bound by such admissions unless avoided by contrary satisfactory evidence given by himself, has no application to the conflicting testimony of a witness not a party to the suit, and consequently no application to the said testimony of prosecutrix. Ib.

6. **Evidence: Statutory Rape: Inference from Witness's Refusal to Criminate Himself.** No inference of the existence of the incriminating fact is permitted to be drawn from the witness's claim of his constitutional right to refuse to answer, and therefore the witness's claim of the privilege is not a proper matter of evidence for the jury's consideration. Where Waddle was absent from the State at the date of defendant's trial for statutory rape of a girl between the ages of fifteen and eighteen years and of previous chaste character, it was not error to exclude the testimony of the justice of the peace to the effect that at the preliminary hearing said Waddle was a witness and on being asked if he had had sexual intercourse with prosecutrix he refused to answer on the ground that his answer would incriminate him. Ib.
7. ———: ———: **Chaste Character: Prior Acts of Sexual Intercourse.** In a prosecution of a defendant for carnal knowledge of a girl between the ages of fifteen and eighteen years and of previous chaste character, testimony of prior acts of sexual intercourse with other men is proper, but subsequent acts with them are not material on the question of her previous chaste character or of defendant's guilt. Ib.
8. **Appeal: No Counsel for Appellant: Review of Record.** Notwithstanding appellant in a criminal case is not represented by counsel, the appellate court will, following the mandate of the statute, review the record to the extent of ruling any error properly assigned in the motion for a new trial. *State v. Gulley*, 484.
9. **Instruction: Credibility of Defendant and Wife.** It is not error to refuse an instruction on the weight and credibility of the defendant's testimony or on that of his wife, although requested by defendant; on the contrary, the giving of such an instruction would be reversible error. [Following *State v. Finkelstein*, 269 Mo. 612.] Ib.
10. ———: **Refusing Defendant's.** It is not error to refuse defendant's requested instructions if the court has already fully and properly instructed on the subjects covered by them. Ib.
11. **Age of Prosecutrix: Testimony of Aunt.** A sister of prosecutrix's mother, and therefore within the purview of the law a member of the mother's family, which fact in a proper situation renders even hearsay declarations admissible in proof of age and pedigree, is a competent witness to testify as to the age of prosecutrix at the time of the assault with intent to rape. Ib.
12. ———: **Family Bible Record: Cumulative Evidence.** Where prosecutrix's age has not been disputed and has already been shown by two uncontradicted and competent witness, the admission in evidence of a bare Bible record showing the name of prosecutrix and the day, month and year of her birth, made by her aunt, among entries relating to the aunt's own children, was so far cumulative as not to constitute reversible error, whether or not the entry was of itself incompetent—a question not determined. Ib.
13. **Accessory: Of Father to Rape of Daughter: Substantial Evidence.** If upon a careful examination of the acts, behavior and language

CRIMINAL LAW—Continued.

- of the father, charged with being an accessory to an assault upon his daughter less than fifteen years of age with intent to rape, it appears to the court that his language may well have been construed to have no other meaning than that the child was to be sent up to the railway boarding car for the purpose and upon a bargain that the cook and his assistant, one or both, might have sexual intercourse with her, and she was sent and the assault made or attempted, the question of the father's guilt becomes an issue for the jury to determine, for these facts constitute substantial evidence. *State v. Gulley*, 484.
14. ———: ———: No Force. And though it may well be that neither the said cook, nor his assistant who committed the assault, nor the father, their accomplice, had in mind the use or necessity for force in accomplishing the design of the cook or his assistant to have sexual intercourse with the child, that fact does not mitigate the offense of the father in aiding and abetting the assault, since, the child being under the age of consent, neither force nor the lack of it cuts any figure in the case. *Ib.*
15. Appellate Practice: Substantial Evidence. If the acts of defendant were obviously susceptible of the construction that defendant is guilty of the crime charged they constitute substantial evidence of his guilt, and the question of his guilt then becomes one of fact for the jury to decide, and not one of law for the appellate court to determine. *Ib.*
16. Statutory Rape: Proof of Force: Not Charged. The offense denounced by the statute is the unlawful act of sexual intercourse with a female under fifteen years of age, and if force is used in accomplishing the crime, that is a mere immaterial incident, and therefore proof that the act was accomplished by force and against prosecutrix's consent though force is not charged in the information, is not error. *State v. Bowman*, 491.
17. ———: Sufficiency of Evidence: No Proof of Force. Because the testimony of prosecutrix is incredible in one particular, it does not follow that it is incredible in all particulars. Where prosecutrix, under fifteen years of age at the time of the act of sexual intercourse, testified that it was accomplished by force, and defendant denied that it was accomplished at all, the jury may convict, although the evidence is too weak to establish forcible ravishment, if her testimony as to the main fact of carnal knowledge is clear and is corroborated by other circumstances. *Ib.*
18. Physician's Account Book: Evidence in Independent Criminal Action: Age of Prosecutrix. The book of a physician, who attended prosecutrix's mother at the time of her birth in another State and made an entry of the charge upon his book, showing the purpose of his visit and the date, and who testifies that he has independent recollection of the occurrence aside from the entry in the book and is certain of the date after having refreshed his memory from the book, is, as a book of account, competent evidence, in a prosecution for statutory rape, of the age of prosecutrix, although the book does not show that the charge was paid. Not only should the physician himself, after refreshing his memory from the book, be permitted to testify, but his book is competent evidence to show the date of prosecutrix's birth. *Ib.*
19. Defendant as Witness: Cross-Examination as to Extrinsic Occurrences. In a prosecution for statutory rape, where defendant had testified in his direct examination only as to what occurred on the

CRIMINAL LAW—Continued.

- night the crime is charged to have been committed, it was error for the State to ask him on cross-examination if he had not at previous times been guilty of criminal intimacy with another girl who on that night accompanied him and prosecutrix in the automobile, although he answered in the affirmative and was made to give the time and place, since the cross-examination was entirely outside the scope of the direct examination. Ib.
20. **Evidence: Similar Offenses: Intent.** In a prosecution of defendant for statutory rape, a written extra-judicial admission made by defendant that he had been guilty of criminal intimacy with another girl, is not admissible for the purpose of showing the intent with which defendant committed the act of sexual intercourse with prosecutrix. Ib.
21. **Hog: Carcass.** A defendant charged with stealing hogs cannot be convicted of stealing the carcass of a hog. The carcass of a hog, by whatever name called, is not a hog. The word "hog" means a live animal. *State v. Hedrick*, 502.
22. _____: _____: **Venue: Failure of Proof.** Defendant was charged with stealing four black hogs in Reynolds County and was indicted in that county. The evidence shows that the hogs were stolen and killed in Dent County, and thereafter their carcasses were taken by defendant and two other persons into Reynolds County, where they were cleaned and divided among them. *Held*, that there was a total failure of proof. Defendant could not under the indictment be convicted of stealing the carcasses of hogs in Reynolds County, because he was not so charged. Ib.
23. _____: _____: **Statute.** The statute (Sec. 4535, R. S. 1909) making it grand larceny to steal any "horse, mare, gelding, colt, filly, ass, mule, hog or neat cattle" shows on its face that it is not capable of being construed to embrace those animals when dead. Ib.
24. **Variance: Question Not Raised in Trial Court.** The statute (Sec. 5114, R. S. 1909) requires that the trial court be allowed an opportunity to rule on the question of a variance between the proof and the allegations in the indictment, and if the question is not raised in the trial court it cannot be ruled in the appellate court. In this case the indictment charged that the defendant by false pretense obtained "the sum of five hundred dollars lawful money" and the evidence showed that a check for that sum was the medium of payment. *State v. Small*, 507.
25. **False Pretense: Indictment.** No set form of an indictment charging the crime of obtaining money by false pretense can be prescribed. The aspects of such crimes are so variable that only a general or skeleton form can be formulated. Ib.
26. _____: _____: **Agent of Defendant.** An indictment which fails to charge that the attorney who transmitted the statement of two women upon which a claim for damages was paid by a railway company, was at the time the agent of defendant in that behalf, is defective. It was further necessary to charge that the attorney in transmitting the statement of the women acted in that behalf at the procurement or upon the instigation of defendant. It was not sufficient to charge that defendant and his accomplices, the two women, consulted and employed the attorney and placed the statement in his hands and that he communicated it to the company. Ib.

CRIMINAL LAW—Continued.

27. ____: ____: **Purported Statement.** An indictment which charges that an attorney exhibited to the agent of a street railway company a statement, "purported to be the statement" of two women, who falsely claimed to have been injured on said company's street car, and said agent, relying on the false and fraudulent statements communicated to him by the attorney of said women, to be true and being deceived thereby, etc., is defective. It should have charged that the exhibit was an actual statement of the women, and not a "purported" statement. *State v. Small*, 507.
28. ____: ____: **Ownership: Receivers.** The ownership of street railway property is not by an ordinary court receivership transferred to the receivers, but remains in the company; and an indictment for obtaining money by false pretense is not invalid because it charges that the money fraudulently obtained was the property of the company. *Ib.*
29. ____: **Instruction: Following Indictment.** An instruction which fairly follows a proper and sufficient indictment and the evidence adduced is not erroneous. *Ib.*
30. **Gambling Device: Poker Table.** A poker table not being one of the devices enumerated in Sec. 4750, R. S. 1909, it is necessary that the indictment point out in what manner the table was adapted to playing games of chance. *State v. Morris*, 522.
31. ____: ____: **Used in Connection With Cards.** It is not the game, but the device, at which Section 4750 is aimed. The use of cards and poker chips in connection with the poker table, where they are not charged to be a part of the device, does not make the table a gambling device. *Ib.*
32. ____: ____: ____: **Indictment.** An indictment which simply charges that defendant set up and kept a certain table and gambling devise, to-wit, a poker table, which was adapted and designed for the purpose of playing games of chance, and that cards and poker chips were used on said table for the purpose of playing games of chance, but does not charge that defendant kept and set up or furnished the cards or chips, or in what manner the table was adapted or designed for the purpose of playing games of chance, is defective. *Ib.*
33. ____: **Playing at Home.** Section 4750, Revised Statutes 1909, does not prohibit one from allowing gambling on his premises. Another section (Sec. 4753, R. S. 1909) covers that offense. *Ib.*
34. **Instruction: Assumption of Defendant's Guilt.** An instruction telling the jury that "flight raises the presumption of guilt, and if you believe from the evidence that the defendant, after having stabbed and killed Philip Carpenter," etc., where the stabbing was not admitted by defendant, but unequivocally denied by him, is erroneous, in that it assumes that defendant "stabbed and killed Philip Carpenter." Even though the great weight of the testimony and defendant's previous extra-judicial confession unerringly point to the falsity of his denial, it is still the province of the jury to decide whether or not it is false. *State v. Mills*, 526.
35. ____: **Flight.** It is proper to give an instruction on the subject of flight where the facts show that defendant four days after the stabbing of deceased left the scene of the crime and went to a distant city and was there shortly afterwards arrested at a place and amid environments which might well argue an attempt at concealment; but the instruction should aptly embody the ex-

CRIMINAL LAW—Continued.

- planation which defendant gives on the witness stand of his alleged flight, or reason for his presence in said city. Ib.
36. **Impeachment: Former Conviction in Police Court.** It was error to permit the defendant, being tried for a felony, to be asked by the State on cross-examination, in an effort to impeach him as a witness, whether he had ever been convicted of a crime, and upon his denial to permit the State to ask him if he had not been convicted of vagrancy in the police court, and upon his further denial, to call the police judge, in rebuttal, and permit him to show by the records that defendant had been convicted of vagrancy in said court. Ib.
37. _____: _____: **Criminal Offense.** A conviction of vagrancy in a police court in violation of a city ordinance is not a conviction of a "criminal offense" within the purview of Sec. 6383, R. S. 1909. Those words are by the statute (Sec. 4925, R. S. 1909) confined to a conviction of a misdemeanor or felony in violation of a State law. Ib.
38. **Instruction on Manslaughter: Failure to Give.** A failure to instruct on manslaughter in a murder case should be specifically assigned as error in the motion for a new trial. Ib.
39. _____: **When Authorized: No Assault.** Insulting actions or gestures without an assault upon the person will not reduce the homicide to manslaughter. Where upon a provocation unknown to defendant, his companion struck deceased and a fight ensued between them, and while defendant was looking on but taking no part in the fight deceased came near him and struck at him but failed to hit him, and thereupon defendant stabbed and killed deceased, there was no manslaughter in the case, and no instruction on the subject should have been given. Ib.
40. **Instruction on Circumstantial Evidence.** Where not a single element in the case depends for its proof upon circumstantial evidence no instruction on that subject should be given. Ib.
41. **Accessories: Before the Fact.** Where the fight which culminated in death came up suddenly, no words passed between defendant and his companion until deceased was stabbed and fell, and when deceased asked a negro woman who was talking with defendant's companion if there was "anything doing" the companion struck deceased and a fight between them began, and defendant without saying or hearing a word stood by with his knife in hand till a favorable opportunity presented itself and then stabbed and killed deceased, no instruction as to accessories before the fact should be given. Ib.

CURTESY.

1. **In Property Devised by Will.** If the wife's will gives an undivided half interest in fee simple in her property to her husband, and the other undivided half interest to their children in fee simple, the husband is put to his election as to whether he will claim under the will or claim his courtesy devolved upon him by operation of law. The two claims are inconsistent, and he cannot have a half in fee simple, and a courtesy in the other half. *Held*, by WILLIAMS, J., dissenting, that the intention to exclude the husband from his legal right to courtesy must be clearly expressed; if it is doubtful, he is not excluded. *Moseley v. Bogy*, 319.

CURTESY—Continued.

2. **Will: Devise to Husband: Fee Simple Exclusive of Curtesy.** The first clause of the will read: "Should I die leaving surviving me my husband and a child or children, then it is my will that my whole estate, real and personal, be divided between my husband and children, in the proportion of one-half to my husband and one-half to my child or children." The third clause read: "Should I die leaving surviving me neither husband nor children, then and in such event I give, devise and bequeath my whole estate, both real and personal, to my mother, Anne E. Griffith." *Held*, that testatrix's intention was to devise to her husband a half interest in fee simple in her entire property, and a half interest in fee simple to her children, and not to devise the real estate subject to the husband's curtesy, even though the will by its terms does not attempt to dispose of his curtesy. The word "estate" did not mean the interest she had in the property, but meant the property itself; and that view is enforced by the third clause, which uses the same words to describe the property and gives her "whole estate, real and personal" to her mother, in case neither husband nor children survived her, it being clear that she intended to give a vendible fee simple title to her mother in such event.

Held (by GRAVES, C. J., concurring) that the same view is further enforced by the second clause of the will by which testatrix declared that in case of her death leaving her husband surviving, but no child or children, her "whole estate, real and personal" is given in equal parts to her husband and mother, thereby making it clear that she did not intend to make the real estate given to her mother subject to the husband's lifetime enjoyment.

Held, by WILLIAMS, J., dissenting, that the husband had an estate or interest in the lands at the time the will was made, and the will by its very terms includes everything that was hers and excludes everything else; and there being no clearly expressed intention to exclude the husband's curtesy, he was not put to his election, but was entitled to hold both his estate by the curtesy and the half interest in the remainder devised to him by the will. *Moseley v. Bogy*, 319.

3. **—: Election: By Putting Will Into Effect.** The husband, to whom his wife's will gave one half her property in fee simple, by presenting the will to the probate court and making the usual affidavit, by applying for letters testamentary and qualifying as executor, by filing an inventory of the estate and swearing to same, in which he set forth the real estate and listed no personal property, by his final settlement reporting that there was no personal property for distribution and being discharged, by receiving a benefit under the will which gave to him a vendible fee simple title to one half of testatrix's property, and by thus deliberately putting the will into effect with full knowledge of his rights under it and of all the property affected by its provisions, elected to take under the will, and cannot now elect to renounce it and take his curtesy in the entire estate.

Held, by GRAVES, C. J., concurring, that a letter addressed to his daughter's lawyer in which he stated that at the time the will was probated he was informed by the court that he had "a fee simple in one half and a curtesy in the other half, as there were no conditions attached to the acceptance of the one half left me absolutely," further shows that he was claiming under the will, one half the estate in fee simple and the other half for life, and manifested his election to take under the will.

CURTESY—Continued.

Held, by WILLIAMS, J., dissenting, (1) that the act of the husband in presenting the will for probate and acting as executor thereunder does not, in itself, constitute an election to claim under the will, and the fact that he was informed by the probate court when he presented the will for probate that he was entitled to one-half the estate in fee simple and to courtesy in the other half nullifies any inference of an election that may be otherwise drawn from qualifying as executor under the will; (2) that the fact that he claimed both courtesy and under the will does not of itself amount to an election to take under the will and relinquish his courtesy; and (3) that if the facts show an election they show an election to take the courtesy and not under the will, since he never received any property under the will, and there was no personality, there has been no change in the ownership or possession of any of the realty since testatrix's death, and he has claimed to be collecting the rents by right of his courtesy. *Ib.*

DAMAGES.

1. **Governor's Refusal to Issue Commission.** A court has no authority to entertain or determine a proceeding which has for its object the assessment of damages against the Governor of the State for failing or refusing to issue a commission to an individual elected to an office. *State ex rel. v. Shields*, 342.
2. **Governor's Executive Duties: Political: Controlled by Mandamus or Action for Damages.** The power conferred upon the Governor to issue a commission to one elected to office is not ministerial, but political, and its exercise cannot be compelled by mandamus or otherwise controlled, and in consequence no action against him for damages for failure or refusal to issue the commission can be maintained. *Ib.*
3. **In Mandamus: Against Respondents After Peremptory Writ.** In a proper situation an independent action for damages will lie to plaintiff in an antecedent mandamus proceeding. Having obtained his peremptory writ plaintiff may, if he show that the return made to the alternative writ by the respondent in the mandamus proceeding was false, have the damages which have accrued to him by reason of such false return assessed either (1) in the mandamus proceeding itself or (2) in an independent action brought for that purpose. But absent a false return, no damages, except costs (and they subject to the court's order), can be recovered in any action brought by relator in the mandamus proceeding against the respondents therein.

Held, by WILLIAMS, J., with whom BLAIR, J., concurs, that whether or not a relator seeking to recover damages resulting from a false return in a mandamus suit must recover his damages in the mandamus proceeding or may proceed in a separate action as in the ancient common law manner of a suit upon a false return, is not for decision in this case, because no mention of a false return is made in the petition, nor does the evidence show that a false return was in fact made, and consequently such question is not for determination in this action. *Smith v. Berryman*, 365.

4. _____: _____: **False Return.** Within the purview of the common law, and of the present statute (Secs. 2547, et seq., R. S. 1909), no recoverable damages accrue to the relator for that he was compelled to bring mandamus, unless the respondent by

DAMAGES—Continued.

making a false return, and thereby raising a false issue of fact, as contradistinguished from pure issues of law, puts the relator to vexation and expense in disproving such false issue of fact. The only difference between the common law and statutes in this respect is that at common law damages were assessed in a separate action, but under the statute they may be assessed in the mandamus proceeding or by independent action; but neither at common law could relator, nor under the statute can he, recover damages unless there was or is a false return. *Smith v. Berryman*, 365.

5. _____: _____: **Insufficient Return.** A statement in the peremptory writ issued by the Court of Appeals that respondents in the mandamus case "returned to said court an insufficient cause" for refusing to affirmatively obey the alternative writ, is not a finding, or evidence, that the return was false. *Ib.*
6. _____: _____: **Statement in Opinion.** If it be true that the Court of Appeals in its opinion in the mandamus case found that the return made by respondents to the alternative writ was false, that fact cannot be considered in the trial of the action for damages, nor by the Supreme Court on appeal, unless that opinion is offered in evidence. *Ib.*
7. _____: _____: **Judicial Notice.** A court does not judicially notice the facts in the record of another and different case—even if determined in the same court. *Ib.*
8. _____: _____: **Failure to Perform Ministerial Duty: Waiver.** In an action based on the theory that plaintiff is entitled to damages which have accrued to him at common law by reason of the refusal of respondents in his mandamus suit to perform a ministerial duty, in that, as mayor and city councilmen, they refused to grant him a license to keep a dramshop, he cannot recover, because no such action existed at common law, and none has been created by statute. By asking for his writ of mandamus, relator was compelled to admit, and by operation of law did admit, that he had no adequate remedy by any other action or proceeding. *Held*, by WILLIAMS, J., concurring, with whom BLAIR, J., concurs, that plaintiff, having elected to proceed by mandamus to compel the performance of a ministerial duty, thereby abandoned or waived whatever right he theretofore had to bring a common law action for damages resulting from the original refusal of the defendants to perform such ministerial duty. *Ib.*

DAMAGES. See, also, **Eminent Domain and Negligence.**

DEEDS. See **Conveyances.**

DEMURRER TO EVIDENCE. See **Practice.**

DEPOSITIONS.

1. **Notice.** Authority to take depositions is purely statutory, and while they may be taken conditionally, no officer, who is without a commission issued out of a court of record, has authority to take testimony or compel the attendance of witnesses by issuing subpoenas until the proper service of a proper notice of the time and place. *Burnett v. Prince*, 68.
2. **Subpoena Before Notice: Subsequent Service.** A subpoena issued before notice to take deposition is served, is issued without authority. And being unauthorized when issued, a subsequent service of the notice and subpoena at the same time will not give it validity. *Ib.*

DEPOSITIONS—Continued.

3. ——: **False Imprisonment.** A person who issues a writ for the arrest of another is liable for an action for false imprisonment if he is without authority to issue it. So that a notary who issues a subpoena for a witness before service of notice to take depositions, is without authority to issue a writ of attachment for such witness on his failure to obey the subpoena, and is liable in an action for false arrest if the witness is attached. Ib.
4. **Notice Naming Wrong Place.** A notice to take depositions in a suit pending in Independence, which names Kansas City instead of Independence as the place where the suit is pending, will not authorize the officer to enforce the attendance of witnesses. The statute makes the courts at the two places distinct and separate courts. Ib.
5. ——: **Mitigation: Nonsuit.** Knowledge by the witness that the notice to take depositions wrongfully named Kansas City instead of Independence as the place where the suit is pending and a concealment of that knowledge for the purpose of creating a damage suit, go to mitigation of damages in a suit for false arrest for failure to obey the subpoena, but will not authorize a nonsuit. Ib.
6. ——: **Waiver.** A signing of an acknowledgment printed on the notice to take depositions, to the effect that defendant acknowledges the service of notice, waives the issue of *de dictum* and all exceptions to time, etc., has no more effect than its terms import. It does not authorize the taking of depositions in a suit filed in a different place from the one mentioned in the notice. Such waiver would not confer validity on a void subpoena issued before the waiver. Ib.

DESCENDANT.

Children of Adopted Child. The word "descendant" used in the statute declaring that a collateral inheritance tax cannot be imposed on the "direct lineal descendant of the testator" includes the lineal descendants of testator's legally adopted child, and cannot be limited to its common-law definition, since that has, as has the definition of the word "child," been enlarged by statute to include persons who did not fall within that definition. *In re Cupples Estate*, 465.

DISCRETION.

Of County Court: County Depository: Rejecting Best Bid: Good Faith. The county court, in determining which is the best bid made by banking institutions to be selected as county depositary, does not exercise judicial discretion, but is a mere administrative agency of the county; and while its official acts carry with them the presumption that it has done its duty, the presumption applies only to acts within its administrative powers done in pursuance of the legislative purpose, and if the power depends on specific facts their existence may always be controverted, and in so far as it is founded on the exercise of judgment it must be exercised in good faith, reasonably and with regard to the legislative purpose. *Denny v. Jefferson County*, 436.

DRAINAGE DISTRICT.

1. **County Court Drainage Act: Amendment of 1913: Discretion as to Necessity for Improvement.** Section 5583 of the County Court Drainage District Act of 1913, Laws 1913, p. 272, if considered

DRAINAGE DISTRICTS—Continued.

alone, without reference to the context, or to the succeeding sections of the act, requires the county court to make an order incorporating a drainage district in cases where the owners of a majority of the acres in the proposed district petition therefor. But such a construction would render the next section (Sec. 5584, Laws 1913, p. 273) meaningless and futile, and Section 5583 itself unconstitutional and void. The two sections must be read together, and when that is done they authorize the county court, even when a petition for incorporation signed by the owners of a majority of the acres in the proposed district is presented, to determine whether or not the improvement is "necessary for sanitary or agricultural purposes, or would be of public utility or conducive to the public health, convenience or welfare," and a determination by the court, after the filing of a remonstrance and an orderly public hearing, that the proposed improvement is not necessary for any of these purposes, cannot be nullified by mandamus. *State ex rel. v. West*, 304.

2. ———: **Constitutionality: Who May Raise Question.** The court in construing a statute may take a view of it which renders it constitutional, whether or not respondents, being mere officers, have a right to raise the question of constitutionality, even when a contrary construction would render it invalid. *Ib.*
3. ———: ———: **Private Property for Public Use: Judicial Question.** Whether the use to which it is proposed to devote private property by the organization of a drainage district is a public or private use, is a judicial question. *Ib.*
4. ———: ———: ———: **No Hearing.** A statute which would authorize the taking of private property for the use of a drainage district without affording the owner an opportunity to have the question of whether the use is a public or private one judicially determined, would be unconstitutional; and a statute which would compel the county court, upon the presentation of a petition signed by the owners of the majority of the acres in a proposed drainage district, to make an unconditional and final order incorporating such district with powers to construct ditches and levees, and levy taxes on all lands therein to pay for same, with no opportunity on the part of the owners of the remaining acres to be heard on the question of the necessity and public utility of such improvement, would be such a statute. *Ib.*

DRAMSHOPS.

Mandamus: Damages: Failure to Perform Ministerial duty: Waiver. In an action based on the theory that plaintiff is entitled to damages which have accrued to him at common law by reason of the refusal of respondents in his mandamus suit to perform a ministerial duty, in that, as mayor and city councilmen, they refused to grant him a license to keep a dramshop, he cannot recover, because no such action existed at common law, and none has been created by statute. By asking for his writ of mandamus, relator was compelled to admit, and by operation of law did admit, that he had no adequate remedy by any other action or proceeding.

Held, by WILLIAMS, J., concurring, with whom BLAIR, J., concurs, that plaintiff, having elected to proceed by mandamus to compel the performance of a ministerial duty, thereby abandoned or waived whatever right he theretofore had to bring a common-law action for damages resulting from the original refusal of the defendants to perform such ministerial duty. *Smith v. Berryman*, 365.

EJECTMENT.

Quashing Execution: Homestead. After judgment in an action of ejectment, in which defendant was personally served and made default, an execution, issued after the adjournment of the term and levied upon the same land, cannot be quashed on the mere ground that the premises constitute defendant's homestead. That defense was appropriate in the action of ejectment, and not having been made defendant is concluded by the judgment therein. *Crouch v. Holterman*, 432.

ELECTION IN TESTATOR'S ESTATE. See **Wills.**

ELECTIONS.

1. **Contest: Notice: Defective and Untimely Service: Waiver: Jurisdiction.** A failure to serve the notice of an election contest for a county office within the time prescribed by statute, and the defect in the manner of service, in that it was served by a private individual instead of by an officer, are waived by a general appearance of the contestee. The parties to the proceeding are the contestant and contestee, and the contest for the title to the office is the subject-matter. Jurisdiction of the subject-matter is conferred by law, and its non-existence cannot be waived; but service of process has to do with jurisdiction of the persons or parties to the action, and any defect in that service, as to time or manner, or a failure to serve the notice at all, is waived by the contestee's appearance to the merits. [Overruling any contrary ruling in State ex rel. *Woodson v. Robinson*, 270 Mo. 212.] *Held*, by GRAVES, C. J., dissenting, with whom BLAIR and WILLIAMS, JJ., concur, that the statute requires the notice to be filed with the clerk, and until it is served in the manner and within the time prescribed by statute and filed with him the court obtains no jurisdiction of the subject-matter or contestee, since it is only a notice so served that can be filed. State ex rel. v. Cave, 653.
2. **—: General and Limited Jurisdiction of Circuit Court.** Circuit courts do not exercise a limited jurisdiction in election contests or proceed according to a prescribed and exclusive procedure, but are courts of general jurisdiction. It is immaterial how the right claimed or remedy prayed for originated so long as the court's jurisdiction is not limited by the law creating the one or conferring the other, and no such express limitation is found in the laws governing election contests. *Held*, by GRAVES, C. J., dissenting, with whom BLAIR and WILLIAMS, JJ., concur, that jurisdiction to hear and determine an election contest is not a part of the general common-law jurisdiction possessed by circuit courts, but the tribunal and the proceeding are purely statutory, and as the statutes do not give the court jurisdiction of the subject-matter until a notice, served in the statutory manner, is filed with the clerk, the contestee by entering his general appearance does not give the court jurisdiction. Ib.
3. **Mandamus: Reinstatement of Cause.** Mandamus is the proper remedy to compel the trial court to reinstate, and to dispose of in the orderly course of procedure, a cause of which it has jurisdiction and which it has dismissed without a hearing. Ib.

EMINENT DOMAIN.

1. **Appellate Practice: Weight of Evidence: Value of Property Taken.** In a condemnation proceeding, where substantial evidence of the

EMINENT DOMAIN—Continued.

- value of the property taken was offered by both sides, the appellate court is powerless to weigh the evidence and say that the amount of damage found by the trial court sitting as a jury, who made a special finding of facts, was inadequate. *St. Louis v. Railroad*, 80.
2. **Condemnation: Measure of Damage: Compensation.** The Constitution and statutes contemplate that the owner of private property taken for public use must be fully compensated therefor. They do not contemplate speculation, but they do require that he be made whole. Ib.
 3. ———: ———: **Accuracy of Estimate.** Any estimate of the damage done to a whole factory plant by taking a parcel thereof is necessarily a guess. An absolute accurate valuation cannot be even approximated. Ib.
 4. ———: ———: **Replacing Part Taken by Purchase of Other Land.** Damage for land taken can be paid only in money; nor can the owner be compelled to exchange the part to be taken for other adjoining parcels which if utilized at purchasable prices would curtail or eliminate the damage. But where only a part of a factory plant is taken and it is claimed the taking of that part destroys the whole plant for its then uses and that the measure of damages is the value of the entire plant, it is competent for the condemnor to show, in diminution of the damage, that there is adjoining property, purchasable at a fair price, which, if utilized in connection with so much of the plant as is not taken, will result in as adequate and valuable a plant as the existing plant. Ib.
 5. ———: ———: **The Words "Or Damaged."** The words "or damaged" placed in the Constitution of 1875 after the word "taken" broadened the field of consequential damages where there is no physical taking of the owner's property; but they do not have the effect of allowing to an owner whose property is actually taken any greater compensation than he could recover without those words, for, both before they were placed in the Constitution and since, the owner is entitled to be compensated for the value of the property taken and the amount of the damage to the property not taken. Consequently the rule announced in *Hannibal Bridge Co. v. Schaubacher*, 57 Mo. l. c. 588, decided prior to the adoption of the Constitution of 1875, is applicable. Ib.
 6. ———: ———: **Taking Part of Factory: Depreciation in Value of Whole.** Where the taking of a part of a tract devoted to a special use results in a depreciation of the plant for that use, the measure of depreciation is the sum required to be expended in order to rehabilitate the property for such special use, if such rehabilitation is practicable; and in measuring the amount of depreciation to which the part damaged but not physically taken has been subjected, if no available property is owned by him whose part is taken, the price at which other adjacent land, equally as valuable intrinsically, as convenient, as economical in use and as accessible, and which can be bought and used in connection with the part not taken, may be shown. Ib.

EQUITY.

1. **General Relief.** A court once possessed of a cause in equity will not release its hold until full equity has been done to all parties interested therein. Especially is this true where there is, in addition to the prayer for specific relief, a general prayer for relief; for, in such case, the court must consider the full import of the pleadings. *Grownay v. O'Donnell*, 167.

EQUITY—Continued.

2. _____: **Cloud on Title: Partial Relief.** Where the question for adjudication is the validity of a deed, and the specific prayer is that it be cancelled as a cloud upon the title to the whole tract, the court, under a prayer for general relief, can grant partial relief, and cancel it as to a part of the tract. *Ib.*
3. **Homestead: Assignment in Equitable Proceeding.** In an equitable proceeding to remove cloud upon title to land, a court of equity has power, both because of its inherent equitable powers and by the statute (Sec. 6713, R. S. 1909), to appoint commissioners to set off the homestead and the widow's dower in the whole tract conveyed by the individual deed of the husband, and by that method ascertain from what portion of the land the cloud upon the title is to be removed. *Ib.*
4. **Quieting Title: Suit in Equity: Cancellation of Deed: Cloud on Title.** An answer asking the court to cancel the deed upon which plaintiff relies to establish his title, as a cloud upon the defendant's title, and a judgment which actually grants this equitable relief, convert the action to quiet title into a suit in equity, and authorize the appellate court to weigh the conflicting evidence.

Held, by FARIS, J., dissenting, with whom BOND, J., concurs, that, in order to entitle defendant to equitable relief and convert the action into a suit in equity, some defense bottomed on well-known equitable grounds must be pleaded, and that a prayer to cancel a deed in plaintiff's chain of title, which in its final analysis amounts only to a contention that defendant's title is better than plaintiff's, does not plead any equitable ground; and the action being one at law, the appellate court cannot settle a conflict on the substantial evidence, but must accept the finding of the trial court sitting as a jury. *Lewis v. Barnes*, 377.

ESTATES TAIL. See Life Estate.**ESTOPPEL.**

In Pais. *Held*, by GRAVES, C. J., with whom a majority concur, that a married woman with no right of possession and no right to sue for possession of land, could not, prior to the Married Woman's Act of 1889, be estopped by acts *in pais*. *Lewis v. Barnes*, 377.

EVIDENCE.

1. **Residence: Intention: How Shown.** Residence is largely a matter of intention, and intention is to be deduced from acts and utterances of the person whose residence is in issue. *In re Lankford Estate*, 1.
2. _____: _____: **Manifested by Will: Abandonment.** A statement in decedent's will, made in this State shortly before his death in this State, that his residence was at "Marshall, Saline County, Missouri," is a solemn written admission that his residence was at such place; and a further statement that his residence had formerly been at "Pueblo, county of Pueblo and State of Colorado," together with the admission, plainly indicate both an abandonment of a former residence and the acquisition of a new one; and the two make out a *prima facie* case of residence in this State for the purposes of an assessment of a collateral inheritance tax. *Ib.*
3. _____: _____: _____: **Disqualification to Vote.** The fact that, after an absence of thirty years in other states, decedent stated in November that he was not qualified to vote in this State, after

EVIDENCE—Continued.

- his return to the residence of his nephew in April, where his will was made and where he died in December, is no contradiction of the solemn admission in his will that he was a resident of this State, for he was not qualified to vote in this State until he had resided here one year. *In re Lankford Estate*, 1.
4. ——: ——: ——: No Payment of Taxes. Nor does the fact that, after an absence of thirty years, he paid no personal taxes in this State, contradict the *prima-facie* case made by the will, since his death, after he returned to this State, occurred before he became liable for taxes here. Nor does the fact that he was not assessed for taxes here. *Ib.*
5. ——: Moral Character of Insured: Charges in Another Court. A charge contained in the answer of plaintiff's wife filed in a divorce proceeding wherein plaintiff was charged with sexual perversion, is not evidence of such fact. Nor is the mere fact that plaintiff stood charged at the time of his suit on the accident policy with a criminal charge in another court, any evidence that he is guilty of the charge. *Lamport v. Assurance Corp.*, 19.
6. ——: Exhibition of Injured Arm in Court. The exhibition in open court by plaintiff of his injured arm, which is the subject of his suit on an accident policy, at the request of his attorney, to a physician who at the time was testifying, to which an objection was sustained, after which no request was made that the jury be discharged or that counsel be admonished for his conduct, is no ground for reversal. *Ib.*
7. Negligence: Pedestrian on Track: Evidence of Signals at Crossing. Where defendant's unfenced spur track ran through a thickly settled community, and the use of the track by pedestrians had been acquiesced in for years by defendant, and its trains were run over the track not for public convenience but at irregular intervals in hauling coal, evidence that no bell was rung or whistle sounded just before or at the time of backing the loaded cars over the track on which the deceased was walking when struck, is competent, and is not to be excluded on the theory that the statutory duty to give such signals at a road crossing does not pertain to a pedestrian on a track 150 feet from a public crossing. *Beard v. Railroad*, 142.
8. Principal and Agent: Automobile Driver: Failure to Observe Master's Direction. Where the chauffeur was directed to take the automobile to the master's garage, which he could have done in an hour, and instead of doing so spent five hours or more driving over the city before (in a drunken state) he negligently ran the car against plaintiff, there is no presumption that at the time of the accident he was acting within the scope of his employment; but in order to hold his master liable for the damage, positive proof that he was in fact at the time of the accident engaged in the performance of duties for the master was required. *Guthrie v. Holmes*, 215.
9. ——: ——: Slight Deviations from Directions. Slight deviations from the master's directions to his chauffeur, or incidental things done by him for his own benefit while in the line of his service for the master, will not destroy the presumption that the regularly employed chauffeur, at the time he negligently ran his automobile against a pedestrian, was acting within the scope of his employment. But the acts of the chauffeur in this case were not slight.

EVIDENCE—Continued.

- deviations, nor mere incidents of his employment, but destroyed the presumption. Ib.
10. **Testamentary Capacity: Application of Tests: Old Age.** A failure of memory resulting from old age or sickness, forgetfulness of the names of persons testator has known, idle questions, a requiring of the repetition of information, personal eccentricities and oddities, are not evidence of such mental disease and deterioration as render testator incapable of disposing of his property by will.
Held, by GRAVES, C. J., dissenting, that the court should not take single facts and say that each, standing alone, is insufficient to justify the submission of mental incapacity to the jury, but that if the combined circumstances tend to show incompetency, the question should be submitted to them; and that the fact that the will was made in April and the testator died in August of softening of the brain, a rather slow but progressive disease, is a strong circumstance tending to show mental incapacity. *Hahn v. Hammerstein*, 248.
11. **Explosion of Dynamite: Independent Contractor: Liability of City.** The use of explosives by an independent contractor in the construction of a sewer, of such character as to necessitate blasting, must be foreseen by the city; but such use is lawful, and having in readiness, near the work, dynamite in proper quantities for use in blasting, is neither necessarily nor so palpably dangerous, when managed in the ordinary way, as to constitute a thing inherently dangerous; and if the explosive so held in readiness becomes, in the circumstances of a particular case, a nuisance by reason of the independent contractor's negligence of method, without more, provided he is not incompetent, he alone, and not the city, is liable for injuries resulting from explosions. *Holman v. Clark*, 266.
12. **—: Negligence in Storing: Proof of Particular Causal Acts.** In determining, after an explosion, whether or not the independent contractor, engaged in constructing a sewer necessitating blasting, had created a nuisance in the street, the locality, the quantity and manner of keeping must be considered, as well as the nature of the explosive and its liability to accidental explosion; and in deciding whether or not a public nuisance existed in connection with the storage of the material which exploded, the question of the manner in which it was kept may enter into consideration; but when it is once determined upon sufficient evidence that such nuisance was maintained, then no particular causal act directly contributing to the explosion need be shown. Ib.
13. **Negligence: Ordinance Speed: Exclusion Harmless Error.** If the ordinance fixed a maximum speed of ten miles per hour and there was evidence that plaintiff's taxicab at the time of his injury was being driven by him at the rate of twenty-five or thirty-five miles, and the instruction made ordinary care the measure of plaintiff's duty it was not harmless but prejudicial error to exclude said ordinance as evidence; for a rate in excess of the ordinance rate was negligence *per se*, and a rate in excess of that speed was contributory negligence and defeated plaintiff's right to recover, and without such ordinance the jury might find that a rate of even thirty-five miles per hour was ordinary care. *Roper v. Greenspon*, 288.
14. **Mandamus: Damages: Insufficient Return.** A statement in the peremptory writ issued by the Court of Appeals that respondents in the mandamus case "returned to said court an insufficient cause" for refusing to affirmatively obey the alternative writ, is not a finding, or evidence, that the return was false. *Smith v. Berryman*, 365.

EVIDENCE—Continued.

15. ———: Statement in Opinion. If it be true that the Court of Appeals in its opinion in the mandamus case found that the return made by respondents to the alternative writ was false, that fact cannot be considered in the trial of the action for damages, nor by the Supreme Court on appeal, unless that opinion is offered in evidence. *Smith v. Berryman*, 365.
16. ———: ———: Judicial Notice. A court does not judicially notice the facts in the record of another and different case—even if determined in the same court. *Ib.*
17. Age of Prosecutrix: Contradictory Evidence by Her: Party to Action. The prosecutrix testified that at the time of the trial, which occurred April 10, 1917, she was sixteen years of age, and that the act of sexual intercourse occurred February 10, 1916. On cross-examination she testified that she was born on July 9, 1901, and that she was fifteen years old in 1915. *Held*, that, her testimony being contradictory on the issue of whether she was between the age of fifteen and eighteen years at the time the act was committed, the question of her age was for the jury. The rule, that where one of the parties to the suit testifies to facts against interest he is bound by such admissions unless avoided by contrary satisfactory evidence given by himself, has no application to the conflicting testimony of a witness not a party to the suit, and consequently no application to the said testimony of prosecutrix. *State v. Weber*, 475.
18. Statutory Rape: Inference from Witness's Refusal to Criminate Himself. No inference of the existence of the incriminating fact is permitted to be drawn from the witness's claim of his constitutional right to refuse to answer, and therefore the witness's claim of the privilege is not a proper matter of evidence for the jury's consideration. Where Waddle was absent from the State at the date of defendant's trial for statutory rape of a girl between the ages of fifteen and eighteen years and of previous chaste character, it was not error to exclude the testimony of the justice of the peace to the effect that at the preliminary hearing said Waddle was a witness and on being asked if he had had sexual intercourse with prosecutrix he refused to answer on the ground that his answer would incriminate him. *Ib.*
19. ———: Chaste Character: Prior Acts of Sexual Intercourse. In a prosecution of a defendant for carnal knowledge of a girl between the ages of fifteen and eighteen years and of previous chaste character, testimony of prior acts of sexual intercourse with other men is proper, but subsequent acts with them are not material on the question of her previous chaste character or of defendant's guilt.
20. Age of Prosecutrix: Testimony of Aunt. A sister of prosecutrix's mother, and therefore within the purview of the law a member of the mother's family, which fact in a proper situation renders even hearsay declarations admissible in proof of age and pedigree, is a competent witness to testify as to the age of prosecutrix at the time of the assault with intent to rape. *State v. Gulley*, 484.
21. ———: Family Bible Record: Cumulative Evidence. Where prosecutrix's age has not been disputed and has already been shown by two uncontradicted and competent witnesses, the admission in evidence of a bare Bible record showing the name of prosecutrix and the day, month and year of her birth, made by her aunt, among entries relating to the aunt's own children, was so far cumulative as not to constitute reversible error, whether or not the entry was of itself incompetent—a question not determined. *Ib.*

EVIDENCE—Continued.

22. **Statutory Rape: Proof of Force: Not Charged.** The offense denounced by the statute is the unlawful act of sexual intercourse with a female under fifteen years of age, and if force is used in accomplishing the crime, that it a mere immaterial incident, and therefore proof that the act was accomplished by force and against prosecutrix's consent, though force is not charged in the information, is not error. *State v. Bowman*, 491.
23. ____: **Sufficiency of Evidence: No Proof of Force.** Because the testimony of prosecutrix is incredible in one particular, it does not follow that it is incredible in all particulars. Where prosecutrix, under fifteen years of age at the time of the act of sexual intercourse, testified that it was accomplished by force, and defendant denied that it was accomplished at all, the jury may convict, although the evidence is too weak to establish forcible ravishment, if her testimony as to the main fact of carnal knowledge is clear and is corroborated by other circumstances. Ib.
24. **Physician's Account Book: Evidence in Independent Criminal Action: Age of Prosecutrix.** The book of a physician, who attended prosecutrix's mother at the time of her birth in another State and made an entry of the charge upon his book, showing the purpose of his visit and the date, and who testifies that he has independent recollection of the occurrence aside from the entry in the book and is certain of the date after having refreshed his memory from the book, is, as a book of account, competent evidence, in a prosecution for statutory rape, of the age of prosecutrix, although the book does not show that the charge was paid. Not only should the physician himself, after refreshing his memory from the book, be permitted to testify, but his book is competent evidence to show the date of prosecutrix's birth. Ib.
25. **Defendant as Witness: Cross-Examination As to Extrinsic Occurrences.** In a prosecution for statutory rape, where defendant had testified in his direct examination only as to what occurred on the night the crime is charged to have been committed, it was error for the State to ask him on cross-examination if he had not at previous times been guilty of criminal intimacy with another girl who on that night accompanied him and prosecutrix in the automobile, although he answered in the affirmative and was made to give the time and place, since the cross-examination was entirely outside the scope of the direct examination. Ib.
26. **Similar Offenses: Intent.** In a prosecution of a defendant for statutory rape, a written extra-judicial admission made by defendant that he had been guilty of criminal intimacy with another girl, is not admissible for the purpose of showing the intent with which defendant committed the act of sexual intercourse with prosecutrix. Ib.
27. **Impeachment: Former Conviction in Police Court.** It was error to permit the defendant, being tried for a felony, to be asked by the State on cross-examination, in an effort to impeach him as a witness, whether he had ever been convicted of a crime, and upon his denial to permit the State to ask him if he had not been convicted of vagrancy in the police court, and upon his further denial, to call the police judge, in rebuttal, and permit him to show by the records that defendant had been convicted of vagrancy in said court. *State v. Mills*, 526.
28. ____: ____: **Criminal Offense.** A conviction of vagrancy in a police court in violation of a city ordinance is not a conviction

EVIDENCE—Continued.

of a "criminal offense" within the purview of Sec. 6383, R. S. 1909. Those words are by the statute (Sec. 4925, R. S. 1909) confined to a conviction of a misdemeanor or felony in violation of a State law. *State v. Mills*, 526.

29. **Fraudulent Conveyance: Cogent Proof.** In a suit to set aside and annul a deed between competent parties, absent any legal presumptions, the same degree of proof must be adduced as is prescribed by courts of equity when such a conveyance is sought to be annulled or its terms altered by oral evidence. *Bennett v. Ward*, 671.

EXECUTION.

1. **Quashing: Grounds.** An execution can be quashed only on grounds that go to the integrity of the judgment, the jurisdiction of the court or defects in the process itself. *Crouch v. Holterman*, 432.
2. **—: In Ejectment: Homestead.** After judgment in an action of ejectment, in which defendant was personally served and made default, an execution, issued after the adjournment of the term and levied upon the same land, cannot be quashed on the mere ground that the premises constitute defendant's homestead. That defense was appropriate in the action of ejectment, and not having been made defendant is concluded by the judgment therein. Ib.
3. **—: —: —: As to Defendant's Wife.** But if defendant's wife was not a party to the action of ejectment, neither the judgment therein nor process issued thereon is conclusive as to her, nor are her homestead rights affected thereby, nor is she precluded by either from asserting them in a proper proceeding. Ib.
4. **Mortgage: To Defeat Execution: Fraud.** The facts in this case show that the deed of trust held by plaintiff and subsequently released by him, was executed by the mortgagor to defeat execution under a judgment obtained by defendants on a debt due from him to them. *Rehm v. Alber*, 452.
5. **—: To Secure Former Gift.** A deed of trust given to plaintiff by the husband of his only child, in an attempted payment for a lot, which had previously been given to the husband, with no intention of receiving any consideration therefor, and made and placed upon record with the intention of placing the lot beyond the reach of the mortgagor's existing creditors, is fraudulent. Ib.
6. **—: Release: Reinstatement After Sale Under Execution: Notice.** A purchaser at execution sale, without actual notice of any outstanding title or claim, gets title through his sheriff's deed as against the mortgagee who, having received a warranty deed in consideration of a cancellation of the debt, by mistake previously released the deed of trust on the margin of its record, at a time when the judgment was a subsisting lien on the property. Ib.

EXEMPTIONS.

1. **Homestead: Subject to Sale for Antecedent Debts.** Under the Homestead Act of 1865 the date of filing the deed conveying land actually occupied by the grantee at the time, fixed the date of the beginning of the homestead, which could not be sold by his administrator to pay debts thereafter contracted by him, unless legally charged thereon in his lifetime; and the title to said homestead, upon the death of the homesteader, vested in his widow, subject to the rights of occupancy by his minor children,

EXEMPTIONS—Continued.

and it could not be sold by the administrator, even though so ordered by the probate court, to pay such debts. *Lewis v. Barnes*, 377.

2. **Homestead Act of 1865: Liberal Construction: Sale to Pay Debts.** Unless the debt of the homesteader, created subsequent to the time he occupied the land as a homestead and filed his deed for record, was legally charged upon the land during his lifetime, in the manner provided by the laws then in force (G. S. 1865, p. 450, sec. 5), no title passed by the administrator's sale made in pursuance to an order of the probate court to pay the debt; and no strained construction of the law will be made in aid of the asserted title acquired by the purchaser at such sale. *Ib.*

EXPRESS TRUST, ASSIGNEE. See **Parties to Action.**

FALSE IMPRISONMENT.

1. **Unauthorized Writ of Arrest.** A person who issues a writ for the arrest of another is liable for an action for false imprisonment if he is without authority to issue it. So that a notary who issues a subpoena for a witness before service of notice to take depositions, is without authority to issue a writ of attachment for such witness on his failure to obey the subpoena, and is liable in an action for false arrest if the witness is attached. *Burnett v. Prince*, 68.
2. _____: _____: **Mitigation: Nonsuit.** Knowledge by the witness that the notice to take depositions wrongfully named Kansas City instead of Independence as the place where the suit is pending and a concealment of that knowledge for the purpose of creating a damage suit, go to mitigation of damages in a suit for false arrest for failure to obey the subpoena, but will not authorize a nonsuit. *Ib.*

FALSE PRETENSE.

1. **Indictment.** No set form of an indictment charging the crime of obtaining money by false pretense can be prescribed. The aspects of such crimes are so variable that only a general or skeleton form can be formulated. *State v. Small*, 507.
2. _____: **Agent of Defendant.** An indictment which fails to charge that the attorney who transmitted the statement of two women upon which a claim for damages was paid by a railway company, was at the time the agent of defendant in that behalf, is defective. It was further necessary to charge that the attorney in transmitting the statement of the women acted in that behalf at the procurement or upon the instigation of defendant. It was not sufficient to charge that defendant and his accomplices, the two women, consulted and employed the attorney and placed the statement in his hands and that he communicated it to the company. *Ib.*
3. _____: **Purported Statement.** An indictment which charges that an attorney exhibited to the agent of a street railway company a statement, "purported to be the statement" of two women, who falsely claimed to have been injured on said company's street car, and said agent, relying on the false and fraudulent statements communicated to him by the attorney of said women, to be true and being deceived thereby, etc., is defective. It should have charged that the exhibit was an actual statement of the women, and not a "purported" statement. *Ib.*

FALSE PRETENSE—Continued.

4. ———: **Ownership: Receivers.** The ownership of street railway property is not by an ordinary court receivership transferred to the receivers, but remains in the company; and an indictment for obtaining money by false pretense is not invalid because it charges that the money fraudulently obtained was the property of the company. *State v. Small*, 507.
5. **Instruction: Following Indictment.** An instruction which fairly follows a proper and sufficient indictment and the evidence adduced is not erroneous. *Ib.*

FORMER ADJUDICATION. See *Res Adjudicata*.**FRAUD.**

1. **County Depositary: Rejection of Best Bid.** A selection of the lowest of two bidders to become county depositary, which is the result of bad faith, partiality and favoritism on the part of the county court, each bidder being solvent, doing a safe and lawful banking business and of good reputation, is against the best interests of the taxpayers, illegal, and fraudulent within the meaning of the law. *Denny v. Jefferson County*, 436.
2. **Mortgage: To Defeat Execution.** The facts in this case show that the deed of trust held by plaintiff and subsequently released by him, was executed by the mortgagor to defeat execution under a judgment obtained by defendants on a debt due from him to them. *Rehm v. Alber*, 452.
3. ———: **To Secure Former Gift.** A deed of trust given to plaintiff by the husband of his only child, in an attempted payment for a lot, which had previously been given to the husband, with no intention of receiving any consideration therefor, and made and placed upon record with the intention of placing the lot beyond the reach of the mortgagor's existing creditors is fraudulent. *Ib.*
4. **Undue Influence: Power to Arbitrarily Dispose of Property.** The owner of property has unlimited power to alienate it by deed or will, if the act is understandingly done and is free from coercion, fraud or lack of mental incapacity and undue influence; and this power of arbitrary disposition of a capable and uninfluenced person pertains to absolute ownership, and may be reflected in deeds or wills exhibiting the loves, hates, partialities or caprices of the grantor or testator, which of themselves are not sufficient reasons for annulling the instruments. *Bennett v. Ward*, 671.
5. ———: **Meaning.** By undue influence is meant that the conveyance when made did not reflect the grantor's wishes and intentions, but the designs and intentions of some one who controlled the grantor's acts. *Ib.*
6. ———: **Preference Among Kindred.** The intention of a childless aged widow to prefer a brother to two sisters in the disposition of her real estate, deliberately and clearly expressed in the deed, is not sufficient to defeat the conveyance, in the absence of evidence that the reason for the preference was extraneous domination of her mind. *Ib.*
7. ———: **Fiduciary Relation: Presumption: Acts of Kindness.** The facts that the childless widow, upon being informed by physicians that she was afflicted with cancer which would soon end her life, not wishing to go to a hospital, went to her brother's home and it was there decided that his two daughters would take her to her own

FRAUD—Continued.

home and care for her through her illness, which they did until her death a year later, and that the last three weeks of her life her brother was with her constantly and assisted her in some business transactions which she was unable to attend to, being acts of affection and kindness, do not suffice to create such a fiduciary relation as afford a just basis for a presumption of undue influence on the part of the brother, who was the grantee in the deed made in his absence three months prior to her death, by which after making gifts for the support and education of some minor step-grandchildren, she conveyed, in consideration of his many uncompensated acts of kindness and an agreement that he was to care and provide for her until her death, her real estate to him, to the exclusion of her two married sisters. Ib.

8. ———: **Cogent Proof.** In a suit to set aside and annul a deed between competent parties, absent any legal presumptions, the same degree of proof must be adduced as is prescribed by courts of equity when such a conveyance is sought to be annulled or its terms altered by oral evidence. Ib.

FRAUD AND DECEIT.

Evidence of Mental Incapacity: Not Pleaded. A ruling by the Court of Appeals that evidence that the plaintiff, in a legal action for fraud and deceit, was a man of weak mentality, inexperienced, overcredulous and unqualified in business dealings, although not pleaded, was admissible under general allegations that defendant knowingly made false and fraudulent representations, with the intent and purpose of deceiving plaintiff and that relying thereon he was deceived and led to enter into the contract, to his damage, is not in conflict with any prior decision of the Supreme Court, for said court has never made any ruling on the point, and, therefore, whether said ruling be right or wrong the Supreme Court has no jurisdiction, by its writ of *certiorari*, to quash said decision.

Held, by GRAVES, C. J., dissenting, with whom BLAIR and WOODSON, JJ., concur, that the evidence which tended to show that plaintiff was weak-minded not only broadened the issues made by the pleadings but contradicted the terms of plaintiff's petition, since allegation that he contracted with defendant relying upon his false statements carried with them the presumption that plaintiff was mentally normal, and such presumption, or legal inference from the facts pleaded, is just as much a part of the petition as if written therein in express words; and to permit him to prove a weak mentality, not only broadens the pleadings, which is a course condemned by many cases of the Supreme Court, but is a contravention of the solemn admissions of his own pleading, and therefore the ruling of the Court of Appeals should be quashed.

Held, also, that the Supreme Court on *certiorari* is not confined to the suggested conflicts in decisions stated in the briefs, but knowing of other conflicts should act in the interest of harmony of opinions. State ex rel. v. Reynolds, 588.

GAMBLING.

1. **Device: Poker Table.** A poker table not being one of the devices enumerated in Sec. 4750, R. S. 1909, it is necessary that the indictment point out in what manner the table was adapted to playing games of chance. State v. Morris, 522.

GAMBLING—Continued.

2. _____: _____: Used in Connection With Cards. It is not the game, but the device, at which section 4750 is aimed. The use of cards and poker chips in connection with the poker table, where they are not charged to be a part of the device, does not make the table a gambling device. *State v. Morris*, 522.
3. _____: _____: Indictment. An indictment which simply charges that defendant set up and kept a certain table and gambling device, to-wit, a poker table, which was adapted and designed for the purpose of playing games of chance, and that cards and poker chips were used on said table for the purpose of playing games of chance, but does not charge that defendant kept and set up or furnished the cards or chips, or in what manner the table was adapted or designed for the purpose of playing games of chance, is defective. Ib.
4. _____: Playing at Home. Section 4750, Revised Statutes 1909, does not prohibit one from allowing gambling on his premises. Another section (Sec. 4753, R. S. 1909) covers that offense. Ib.

GOVERNOR.

1. **Damages: Refusal to Issue Commission.** A court has no authority to entertain or determine a proceeding which has for its object the assessment of damages against the Governor of the State for failing or refusing to issue a commission to an individual elected to an office. *State ex rel. v. Shieids*, 342.
2. **Executive Duties: Political: Controlled by Mandamus or Action for Damages.** The power conferred upon the Governor to issue a commission to one elected to office is not ministerial, but political, and its exercise cannot be compelled by mandamus or otherwise controlled, and in consequence no action against him for damages for failure or refusal to issue the commission can be maintained. Ib.

GRADE OF STREETS, COSTS. See **Public Service Commission.****GRAND JURY.**

1. **Contempt: Revealing Secrets of Grand Jury.** Inquiry by the grand jury of a witness as to the source of information he caused to be published in a newspaper, that a certain person had been indicted, who had not been arrested, is a legitimate and proper subject of inquiry by the grand jury. *Ex parte Hollaway*, 108.
2. _____: _____: Reasons for Statute. The purpose of the statute in requiring the secrets of the grand jury to be kept inviolate and in forbidding a disclosure of the fact that an indictment has been found against a person not in actual confinement or under bail, is to prevent the escape of such person; but the fact that the statute forbids such revelations, is of itself sufficient reason, whether the offense charged be great or small. Ib.
3. _____: _____: Excuse: To Accommodate Newspaper Reporter. He who violates the command of the statutes forbidding a revelation of the fact that the grand jury has found an indictment against an accused who has not been arrested or bailed, cannot justify his conduct by the fact that the person to whom under the cover of confidential friendship he gave the information was the reporter of a newspaper who desired to "scoop" his competitor in the business of obtaining and printing so-called news. Ib.

HABEAS CORPUS. See **Contemp.**

HEIRS.

1. **Illegitimate Child.** The right of a plaintiff to claim title to land as the heir of the testator, who by will gave a life estate to his wife, is precluded by testator's death on February 15, 1860, and the birth of plaintiff to said widow on May 31, 1861. *Ross v. Presbyterian Church*, 96.
2. ———: **Heir of Mother.** A child of the testator's widow who took no steps to enlarge the life estate given her by the will into a fee in one-half the land as authorized by statute, cannot claim title in the land as heir at law of such widow. *Ib.*
3. **Illegitimate Child: Right to Contest Will.** Unless the plaintiff can prove a lawful marriage between testator and his mother, either before or after his birth, and thus establish his heirship and consequent right to attack the will, he must establish, in some other way, a status giving him a financial interest in testator's estate which would be benefitted by a setting aside of the will. No such interest can arise from the fact that he is the natural but illegitimate child of the testator, for in such case he has no heritable right except through his mother. *Hahn v. Hammerstein*, 248.
4. ———: ———: **Financial Interest: Devisee Under Former Will.** No such financial interest in testator's estate as authorizes him to contest the will is established by a showing that he was the devisee in a former will which was taken by testator after its execution into his own possession and kept until it was destroyed by him prior to the execution of the will in contest. *Ib.*
5. **Children of Adopted Child: Classified as Natural Children.** The statute relating to the adoption of children (Sec. 1671, R. S. 1909) makes a child legally adopted by deed an heir of the adopting parent, with all the incidents of that relation, including the incident of the transmission of the inheritance upon the death of such child; and the Statute of Descents and Distributions (Sec. 332, R. S. 1909) makes no distinction between such an adopted child and a child by birth, but includes the adopted child in the general designation of children, and his or her descendants in the general designation of the descendants of children. *In re Cupples Estate*, 465.

HOG.

1. **Carcass.** A defendant charged with stealing hogs cannot be convicted of stealing the carcass of a hog. The carcass of a hog, by whatever name called, is not a hog. The word "hog" means a live animal. *State v. Hedrick*, 502.
2. ———: **Venue: Failure of Proof.** Defendant was charged with stealing four black hogs in Reynolds County and was indicted in that county. The evidence shows that the hogs were stolen and killed in Dent County, and thereafter their carcasses were taken by defendant and two other persons into Reynolds County, where they were cleaped and divided among them. *Held*, that there was a total failure of proof. Defendant could not under the indictment be convicted of stealing the carcasses of hogs in Reynolds County, because he was not so charged. *Ib.*
3. ———: **Statute.** The statute (Sec. 4535, R. S. 1909) making it grand larceny to steal any "horse, mare, gelding, colt, filly, ass, mule, hog or neat cattle" shows on its face that it is not capable of being construed to embrace those animals when dead. *Ib.*

HOMESTEAD.

1. **Deed of Husband Alone: Cancellation.** A deed made in 1909 by the husband alone, which conveyed lands of which the unassigned homestead acquired prior to the Act of 1895 was a part, is invalid as to the homestead without the signature of the wife, and as to it may be cancelled as a cloud upon the title, but it not invalid as to the rest of the tract, and as to it may be confirmed. *Growth v. O'Donnell*, 167.
2. **Definition: Conveyance.** The homestead in the country as defined in the statute means the dwelling house and appurtenances and the land used in connection therewith to the extent and value of \$1500, and it includes only so much of the land as (together with the dwelling house and appurtenances) is worth \$1500. It is only as to that homestead that the statute makes void the individual deed of the husband. *Ib.*
3. **Conveyance by Husband Alone: Valid as to Excess.** A deed signed by the husband alone, who has a living wife, conveying a whole tract owned by him, in which he has an unassigned homestead, is not void as a whole, but is valid as to the excess of land over and above the homestead proper as defined by the statute, subject to the wife's inchoate right of dower in the excess. [Ruling that such question was not involved in *Bushnell v. Loomis*, 234 Mo. 371, and that the decision therein was not intended, in view of the facts held in judgment, to announce a contrary rule.] *Ib.*
4. **Assignment in Equitable Proceeding.** In an equitable proceeding to remove cloud upon title to land, a court of equity has power, both because of its inherent equitable powers and by the statute (Sec. 6713, R. S. 1909), to appoint commissioners to set off the homestead and the widow's dower in the whole tract conveyed by the individual deed of the husband, and by that method ascertain from what portion of the land the cloud upon the title is to be removed. *Ib.*
5. **Filing Deed: Date as Shown by Index.** The date the deed was deposited in the office of the Recorder of Deeds, as shown by the "Abstract and Index of Deeds" required by law to be kept, determines the date on which the instrument was filed, and not the certificate on the deed reciting that it was "filed for record" on a subsequent date.

Held, by GRAVES, C. J., concurring, with whom a majority concur, that a deed is filed for record when it is presented to and left with the Recorder of Deeds for record, and the neglect of the Recorder to actually file or record it cannot defeat the rights of a grantee who has actually left it with him for record, and if the Recorder has wilfully or negligently failed to file and record a deed to a homestead oral proof of the fact of its deposit with him is admissible; and, in an action to quiet title, converted by the answer and judgment into a suit in equity, it will be held by the appellate court that a memorandum on the deed in the handwriting of the Recorder reciting that it had been filed in his office on January 6, 1872, and entries in the "direct" and "indirect" parts of the Index Record showing the same date of filing, show a filing on that date, and such fact is not overcome by a certificate attached to the deed and bearing date of July 19, 1872, in which it was stated the instrument was filed on said July 19, 1872, the Deputy Recorder, who made it, testifying that he did not know how the body of the certificate bore the date of July 19, 1872, unless it was a mistake—it being apparent that the deed was filed January 6th, but was not actually recorded until July 19th.

HOMESTEAD—Continued.

Held, by FARIS, J., dissenting, with whom BOND, J., concurs, that, the cause being an action at law, and the substantial evidence as to the date of the filing of the deed being in sharp conflict, it was for the trial court sitting as a jury to determine its probative force, and his finding that it was filed for record on July 19th the appellate court cannot review; and that the announcement in the main opinion that the direct and cross entries in the Index Record take precedence in comparative probative force over a contrary recital in a solemn sealed certificate made by the Recorder both upon the record and the deed itself, is not in consonance with what has been said by this court in a number of cases. Lewis v. Barnes, 377.

6. ———: **Homestead: Subject to Sale for Antecedent Debts.** Under the Homestead Act of 1865 the date of filing the deed conveying land actually occupied by the grantee at the time, fixed the date of the beginning of the homestead, which could not be sold by his administrator to pay debts thereafter contracted by him, unless legally charged thereon in his lifetime; and the title to said homestead, upon the death of the homesteader, vested in his widow, subject to the rights of occupancy by his minor children, and it could not be sold by the administrator, even though so ordered by the probate court, to pay such debts. Ib.
7. **Act of 1865: Liberal Construction: Sale to Pay Debts.** Unless the debt of the homesteader, created subsequent to the time he occupied the land as a homestead and filed his deed for record, was legally charged upon the land during his lifetime, in the manner provided by the laws then in force (G. S. 1865, p. 450, sec. 5), no title passed by the administrator's sale made in pursuance to an order of the probate court to pay the debt; and no strained construction of the law will be made in aid of the asserted title acquired by the purchaser at such sale. Ib.
8. ———: **Reforming Mortgage: Abandonment of Lien: Sale to Pay General Debts.** If the homesteader had really intended that an executed mortgage should convey the homestead and had failed to do so because the land was incorrectly described, a proceeding in equity to reform the instrument so as to "legally charge" the land with the debt might have been maintained after the homesteader's death; but, as the statute of 1865 vested the title of the homestead lands in the widow, such a suit could not have been maintained without making her and the minor children parties, and if brought against the administrator alone a judgment pretending to foreclose the mortgage was void. But in this case the facts show that the administrator abandoned his lien, and caused the administrator and probate court to sell the homestead lands to pay general debts, his own among others, and it is now too late for the defendant who claims under said administrator's deed to abandon that claim and claim under an old lien which he never sought to enforce. Ib.
9. **Limitations: Thirty-Year Statute: Strictly Construed.** An acquisition of land in the manner prescribed by the thirty-year Statute of Limitations (Sec. 1884, R. S. 1909) contains no equity that calls upon the courts to be astute in devising ways not directly pointed out by it to support it; the right has no necessary foundation in merit, and he who claims lands under it must look only to the law for support. Ib.

HOMESTEAD—Continued.

10. _____: _____: Directed to Right to Possession: When Begins to Run: Remaindermen. The thirty-year Statute of Limitations is directed against such persons only as claim or might claim possession of the land; it does not defeat those who owned the title, but were not entitled to possession. For failure to pay taxes it imposes the penalty of forfeiture against the true owner who was entitled to possession and whose duty it was to pay them, but it does not impose such penalty against him who had no such possessory right as made it his legal duty to pay the taxes.

Held, by GRAVES, J., concurring, with whom a majority concur, that it is the duty of the life tenant to pay the taxes, and the law does not impose that duty upon the remainderman.

Held, also, that the statute does not begin to run until the person entitled to possession both quits possession and quits paying taxes. *Lewis v. Barnes*, 377.

11. _____: _____: _____: Remarriage of Widow: Right of Husband to Possession: Right of Widow's Grantee. The homesteader died in 1873; in 1875 the widow remarried, and her husband died in 1911, and in 1912 she conveyed the land to her only surviving child, the plaintiff, the other child of the homesteader having died in infancy after his death. No lien was legally charged against the land by the homesteader during his lifetime, and therefore under the then statute the title, upon his death, passed to the widow, for the use and occupancy of herself and his children during their minority. The property was sold by the administrator in 1876, under an order of the probate court, to defendant's grantor, to pay the homesteader's debts. At that time it was not encumbered with taxes. *Held*, that after the widow's remarriage her husband was entitled to the possession, and, as the property was then unencumbered with taxes, the thirty-year statute had not begun to run against her, nor did it begin to run against her or her grantee until the husband's possessory right terminated, and since thirty years have not elapsed since then the thirty-year statute will not operate to divest title out of the widow's grantee and vest it in defendant, although he and those under whom he claims have been in possession under the administrator's void deed and have paid taxes for more than thirty-five years.

Held, by GRAVES, C. J., concurring, with whom a majority concur, that upon the widow's second marriage, the law separated the whole estate in the land then vested in her, into two estates, namely, the possessory right or life estate of the husband, and the remainder in her, and thereafter the right of possession was in the husband during his life, and the thirty-year statute did not prior to her said second marriage begin to run against her unless she had ceased to pay taxes and had abandoned the possession.

Held, also, whether or not the widow paid the taxes prior to her remarriage, she will not be held to have quit the possession until defendant through his void deed claimed the right to possession, and the burden is on him to show that she had sooner abandoned possession, and she did not do that by going away to another state, leaving a tenant in charge and directing her agent to collect the rents and after paying the taxes send the balance to her. *Ib.*

12. **Estopel in Pais.** *Held*, by GRAVES, C. J., with whom a majority concur, that a married woman with no right of possession and no right to sue for possession of land, could not, prior to the Married Woman's Act of 1889, be estopped by acts *in pais*. *Ib.*

HOMESTEAD—Continued.

13. **Limitations: Thirty-Year Statute: Possessory Right of Husband: Married Woman's Act.** Prior to the enactment of the Married Woman's Act of 1889, the right to possession of the wife's lands was in the husband, and that right in all lands antecedently acquired was not affected by that act. Said act was prospective in its operation. Ib.
14. ———: **Ten-Year Statute: Possession of Administrator.** Adverse possession cannot be founded upon a wrongful taking possession of estate lands by the administrator, even though while it was in his possession it was sold to defendant under a void judgment. The administrator has no title to decedent's real estate, and his official position cannot constitute a claim of title, or furnish a basis for adverse possession. Ib.
15. **Quashing Execution: In Ejectment.** After judgment in an action of ejectment, in which defendant was personally served and made default, an execution, issued after the adjournment of the term and levied upon the same land, cannot be quashed on the mere ground that the premises constitute defendant's homestead. That defense was appropriate in the action of ejectment, and, not having been made, defendant is concluded by the judgment therein. Crouch v. Holterman, 432.
16. ———: ———: **As to Defendant's Wife.** But if defendant's wife was not a party to the action of ejectment, neither the judgment therein nor process issued thereon is conclusive as to her, nor are her homestead rights affected thereby, nor is she precluded by either from asserting them in a proper proceeding. Ib.

HOMICIDE. See **Murder.**

HUSBAND AND WIFE.

Limitations: Thirty-Year Statute: Possessory Right of Husband: Married Woman's Act. Prior to the enactment of the Married Woman's Act of 1889, the right to possession of the wife's lands was in the husband, and that right in all lands antecedently acquired was not affected by that act. Said act was prospective in its operation. Lewis v. Barnes, 377.

ILLEGITIMATE CHILDREN. See **Heirs.**

IMPROPER PLAINTIFF. See **Parties to Action.**

INDICTMENT AND INFORMATION.

1. **Hog: Carcass.** A defendant charged with stealing hogs cannot be convicted of stealing the carcass of a hog. The carcass of a hog, by whatever name called, is not a hog. The word "hog" means a live animal. State v. Hedrick, 502.
2. **False Pretense.** No set form of an indictment charging the crime of obtaining money by false pretense can be prescribed. The aspects of such crimes are so variable that only a general or skeleton form can be formulated. State v. Small, 507.
3. ———: **Agent of Defendant.** An indictment which fails to charge that the attorney who transmitted the statement of two women upon which a claim for damages was paid by a railway company, was at the time the agent of defendant in that behalf, is defective. It was further necessary to charge that the attorney in transmitting the statement of the women acted in that behalf at the procurement

INDICTMENT AND INFORMATION—Continued.

- or upon the instigation of defendant. It was not sufficient to charge that defendant and his accomplices, the two women, consulted and employed the attorney and placed the statement in his hands and that he communicated it to the company. *State v. Small*, 507.
4. _____: **Purported Statement.** An indictment which charges that an attorney exhibited to the agent of a street railway company a statement, "purported to be the statement" of two women, who falsely claimed to have been injured on said company's street-car, and said agent, relying on the false and fraudulent statements communicated to him by the attorney of said women, to be true and being deceived thereby, etc., is defective. It should have charged that the exhibit was an actual statement of the women, and not a "purported" statement. *Ib.*
 5. _____: **Ownership: Receivers.** The ownership of street railway property is not by an ordinary court receivership transferred to the receivers, but remains in the company; and an indictment for obtaining money by false pretense is not invalid because it charges that the money fraudulently obtained was the property of the company. *Ib.*
 6. **Gambling Device: Poker Table.** A poker table not being one of the devices enumerated in Sec. 4750, R. S. 1909, it is necessary that the indictment point out in what manner the table was adapted to playing games of chance. *State v. Morris*, 522.
 7. _____: _____: **Used in Connection With Cards.** It is not the game, but the device, at which section 4750 is aimed. The use of cards and poker chips in connection with the poker table, where they are not charged to be a part of the device, does not make the table a gambling device. *Ib.*
 8. _____: _____: _____. An indictment which simply charges that defendant set up and kept a certain table and gambling device, to wit, a poker table, which was adapted and designed for the purpose of playing games of chance, and that cards and poker chips were used on said table for the purpose of playing games of chance, but does not charge that defendant kept and set up or furnished the cards or chips, or in what manner the table was adapted or designed for the purpose of playing games of chance, is defective. *Ib.*
 9. _____: **Playing at Home.** Section 4750, Revised Statutes 1909, does not prohibit one from allowing gambling on his premises. Another section (Sec. 4753, R. S. 1909) covers that offense. *Ib.*
- INHERITANCE TAX.** See **Collateral Inheritance Tax.**
- INSANE PATIENT.** See **Patient in State Hospital.**
- INSTRUCTIONS.**
1. **Assuming Disputed Facts: Comment on Evidence.** Instructions which assume as true facts in dispute, or contain unwarranted comments on the evidence, should be refused. *Lampert v. Assurance Corp.*, 19.
 2. _____: **Plaintiff's Failure to Testify.** An instruction telling the jury that plaintiff was present in court and heard the testimony of witnesses relating his conduct and movements about the time he received the injury complained of, and that from his failure to take the stand in his own behalf a strong presumption of law arises that his testimony, if given, would not sustain the

INSTRUCTIONS—Continued.

- issues on his part, if ever proper, is not proper in a case where defendant took plaintiff's deposition, which covered every point that might possibly relate to the issues, and read it to the jury. Ib.
3. **Negligence: Child Near Track: Ordinary Care Towards Persons.** An instruction telling the jury that "a motorman in charge of a street car is only required to exercise towards persons near its tracks ordinary care to prevent injury to persons if near the track" would not by using the word "persons" cause the jury to infer that a three-year-old child is to be considered as an adult, and is not error. Turnbow v. Dunham, 53.
4. _____: _____: **Precaution After Danger Seen.** An instruction which tells the jury that before they can find for plaintiff they must find that defendant's motorman was guilty of negligence in not taking such precautions as a reasonably prudent person would have done under the same circumstances, to avoid injuring the three-year-old child, in the street between the curb and track, "after the motorman saw him in a position of danger from being run over by the rear wheels of the car," is erroneous. The rear wheels having run over the child's feet, the instruction relieved defendant of liability if the motorman failed to see him in a position of danger from being run over by them, whether such failure to see was or was not the result of the motorman's negligence. Ib.
5. _____: _____: **Use of Word Ran.** An instruction that assumed that the three-year-old child "ran" towards the car as it passed, where there is no evidence that he ran, while not reversible error, would be more technically accurate if it used the word "move." Ib.
6. _____: _____: **Contest Between Persons of Equal Standing.** Where the rear wheels of a street car ran over the feet of a three-year-old child, and he sues for damages, an instruction telling the jury that the case should be "considered the same as if it was a contest between two persons of equal standing in the community" should not be given, because it is apt to mislead the jury into believing that the defendant owed to the child no greater duty to look out for its safety than it owed to an adult under like circumstances. Ib.
7. _____: **Unavoidable Accident.** Where the issue raised by the facts is simply one of negligence *vel non* of the motorman, and there is no evidence of any accident within the proper meaning of the term, an instruction telling the jury that if they believe and find from the evidence that plaintiff's injuries were "due to an unavoidable accident and not to any negligence of the motorman," should not be given. Ib.
8. _____: **Approximate Cause: Undefined.** The use of the words "approximate cause" in an instruction, without defining or explaining the term, tends to mystify, rather than to aid the jury in reaching a correct conclusion. Ib.
9. **Criminal Intent: Unexplained Possession of Stolen Property.** The purpose of an instruction on the question of the presumption of guilt arising from the recent unexplained possession of stolen property, is to aid in determining the identity of the felonious taker; and where defendant admits that the hog alleged to have been stolen was by his direction taken from the range and placed in his barn by his hired hands, such an instruction should not be

INSTRUCTIONS—Continued.

- given, since the question at issue is not the identity of the taker, but the intent with which the hog was taken. State v. Lee, 121.
10. ———: Assuming Property Was Stolen. Where the issue is whether or not the hog found in defendant's possession was stolen, an instruction which assumes that the hog was stolen is erroneous. Ib.
11. Insane Patient: Notice to State Hospital: Changing "Deposited With" to "Transmitted To:" Definition. The court did not err in changing the words "deposited with" to "transmitted to" in the instruction asked by the hospital, directing the jury that although they might find from the evidence that the county court made the order transferring the insane patient from a county charge to a pay patient, yet, unless they should further find that a certified copy of the order was "deposited with" the superintendent of the hospital, the verdict should be for it. The statute requires the clerk to "transmit" the certificate to the superintendent, and that duty is discharged when the order is duly mailed in an envelope and addressed to the proper party. That is the meaning of "transmit," while "deposit with" is not synonymous with "filing," but means something more than "to deliver" and something different. State Hospital v. Cole County, 135.
12. ———: ———: That Notice Was Received. The appellant hospital cannot complain that the jury was not required in terms to find that the order of the county court transferring an insane person theretofore kept at the hospital as a county charge to a pay patient, was actually received by the hospital authorities, where the word "received" was contained in no instruction asked, and the theory of appellant's instruction on which the issue went to the jury was that the proper mailing of the order was a *prima facie* presumption that it was duly received. Ib.
13. Negligence: Anticipating Pedestrian on Track. It being the duty of the railroad company to ring the bell or sound the whistle when it approached that portion of its track used for travel by pedestrians, it was error to instruct the jury that their verdict must be for defendant unless the trainmen saw or by the exercise of ordinary care could have seen the deceased in a position of peril and thereafter failed to stop the train in time to avoid striking him, especially when the facts point to the conclusion that the failure to give either of the signals tended to cause the injury. That neither of the trainmen saw the deceased did not lessen the duty to give one or the other signal. Beard v. Railroad, 142.
14. ———: Based on Conjecture: Climbing on Car. The giving of an instruction which attempts by inference based on conjecture to define the limit of defendant's liability is error. To tell the jury that their verdict must be for defendant if the deceased fell or was thrown under a moving train in an attempt to climb on the cars, where there is no testimony from which the conclusion can reasonably be drawn that he made such an attempt, is error. Ib.
15. ———: Result of Mere Accident. Where the injury was caused either by the negligence of defendant or that and the contributory negligence of deceased, an instruction that if the injury was the result of a mere accident plaintiff cannot recover, should not be given. Ib.
16. ———: Trespasser. The deceased was not a trespasser when struck by defendant's train while walking on a portion of its track which ran through a thickly settled community and was much used

INSTRUCTIONS—Continued.

- as a pathway by pedestrians with defendant's acquiescence; and an instruction limiting defendant's liability on the assumption of trespass was erroneous. Ib.
17. **Credibility of Defendant and Wife.** It is not error to refuse an instruction on the weight and credibility of the defendant's testimony or on that of his wife, although requested by defendant; on the contrary, the giving of such an instruction would be reversible error. [Following State v. Finkelstein, 269 Mo. 612.] State v. Gulley, 484.
18. **Refusing Defendant's.** It is not error to refuse defendant's requested instructions if the court has already fully and properly instructed on the subjects covered by them. Ib.
19. **Following Indictment.** An instruction which fairly follows a proper and sufficient indictment and the evidence adduced is not erroneous. State v. Small, 507.
20. **Assumption of Defendant's Guilt.** An instruction telling the jury that "flight raises the presumption of guilt, and if you believe from the evidence that the defendant, after having stabbed and killed Philip Carpenter," etc., where the stabbing was not admitted by defendant, but unequivocally denied by him, is erroneous, in that it assumes that defendant "stabbed and killed Philip Carpenter." Even though the great weight of the testimony and defendant's previous extra-judicial confession unerringly point to the falsity of his denial, it is still the province of the jury to decide whether or not it is false. State v. Mills, 526.
21. **Flight.** It is proper to give an instruction on the subject of flight where the facts show that defendant four days after the stabbing of deceased left the scene of the crime and went to a distant city and was there shortly afterwards arrested at a place and amid environments which might well argue an attempt at concealment; but the instruction should aptly embody the explanation which defendant gives on the witness stand of his alleged flight, or reason for his presence is said city. Ib.
22. **On Manslaughter: Failure to Give.** A failure to instruct on manslaughter in a murder case should be specifically assigned as error in the motion for a new trial. Ib.
23. **_____: When Authorized: No Assault.** Insulting actions or gestures without an assault upon the person will not reduce the homicide to manslaughter. Where upon a provocation unknown to defendant, his companion struck deceased and a fight ensued between them, and while defendant was looking on but taking no part in the fight deceased came near him and struck at him but failed to hit him, and thereupon defendant stabbed and killed deceased, there was no manslaughter in the case, and no instruction on the subject should have been given. Ib.
24. **On Circumstantial Evidence.** Where not a single element in the case depends for its proof upon circumstantial evidence no instruction on that subject should be given. Ib.
25. **Omission of Necessary Element: Cured by Others.** An instruction purporting to cover the whole case and directing a verdict for plaintiff, from which is omitted an element of negligence necessary to plaintiff's right to recover, cannot be cured by one given for defendant; and a holding by the Court of Appeals that such omitted necessary element is supplied by other instructions given, con-

INSTRUCTIONS—Continued.

travenes certain previous rulings of the Supreme Court, and requires that its decision be quashed.

Held, by BLAIR, J., dissenting, that the Court of Appeals erred in holding that the instruction was erroneous or that it omitted any element necessary to plaintiff's right to recover, and that being true its opinion cannot be quashed for that it further erred in holding that the omission was supplied by other instructions given. *State ex rel. v. Ellison*, 571.

INSURANCE.

1. **Accident: Accidental or Intentional Injury.** Evidence tending to show that plaintiff fell from the step of a street car, his shoulders striking the ground first, that immediately after the accident a bruised place was discovered on the rear portion of the top of his head and he was lying on his back, his left hand crushed; that the unconsciousness was caused by concussion of the brain resulting from the injury to his head, and could not have been produced by the injury to his hand; and that he became unconscious before his hand was crushed, is evidence that the injury was accidental, and that he did not intentionally thrust his hand under the car wheel, and made a case for the jury. *Lamport v. Assurance Corp.*, 19.
2. **—: Warranties: That Beneficiary Was Wife.** In a suit on an accident policy by the insured for injuries to himself, a warranty in the policy that a certain named woman was his wife is not material, and if untrue is not a defense. The purpose of naming a beneficiary is to designate a person who will receive the insurance money only in event of insured's death. *Ib.*
3. **—: —: Policies of Life Insurance: Materiality: Questions for Jury.** An accident policy, at least those portions of it providing indemnity for loss of life, is a policy of life insurance, within the meaning of the suicide statute (Sec. 6937, R. S. 1909), and that statute provides that no misrepresentation made in obtaining a policy of insurance on the life of any person shall be deemed material unless the matter misrepresented actually contributed to the contingency or event on which the policy is to become void, and whether it so contributed in any case shall be a question for the jury. Even though the representation or warranty as to the beneficiary in case of the insured's death is false, the court cannot peremptorily instruct to find for the company, for the jury still have the right to say whether such misrepresentation actually contributed to the loss. *Ib.*
4. **—: Warranties: Insured's Habits of Life: Income: Other Insurance.** Even though the insured warranted that his habits of life were correct, that his income per week exceeded the gross amount of weekly indemnity promised in all accident policies carried by him, and that he had no other accident insurance, if the evidence upon the issue of the falsity of these warranties is conflicting, the matter is for the jury, and the court cannot peremptorily instruct them to find for defendant. *Ib.*
5. **Action on Policy: Fraudulent Representations: Question for Jury.** The Supreme Court has not ruled that the fraudulent intent of the insured in making misrepresentations as to the value of the goods insured or the extent of the injury must always be submitted to the jury. The rule is that where the evidence is such that the jury may reach a conclusion one way or the other on the question of fraudulent intent, the case must go to the jury; but where the

INSURANCE—Continued.

evidence conclusively shows a fraudulent intent in making the misrepresentations a demurrer to the evidence should be sustained. And whether the Court of Appeals was right or wrong in holding that the insured's evidence conclusively showed fraudulent misrepresentations as to material facts by him, their ruling in that respect was not in conflict with any prior ruling of the Supreme Court, and for that reason cannot be quashed by *certiorari*. *State ex rel. v. Farrington*, 157.

JUDGMENTS:

1. **Contempt: Sufficiency of Judgment.** A judgment which sets forth facts conveying definite information of the precise subject-matter under inquiry by the grand jury at the time contemnor refused to answer, is sufficiently certain as to such subject. *Ex parte Hollaway*, 108.
2. **_____: Term of Commitment: Error Corrected on Habeas Corpus.** The judgment and commitment fixing the punishment of a contemnor, who has been properly adjudged guilty of contemptuously and contumaciously refusing to answer proper questions propounded to him by the grand jury, at imprisonment "until the further order of this court, or until he be otherwise legally discharged by due process of law," is manifestly erroneous, since the statute fixes the duration of punishment till contemnor gives the evidence which he had previously contemptuously refused to give; but he is not on that account entitled, on *Habeas Corpus*, to his unconditional discharge, but the contempt being criminal, as contradistinguished from civil contempt, the court, under the provisions of the statute (Sec. 5316, R. S. 1909), will assess the proper punishment. *Ib.*
3. **Quashing Execution: Grounds.** An execution can be quashed only on grounds that go to the integrity of the judgment, the jurisdiction of the court or defects in the process itself. *Crouch v. Holterman*, 432.
4. **Awarding Funds to Unsuccessful Bidder.** In an injunction brought by taxpaying citizens to set aside an order of the county court designating the lowest of two equally solvent and competent bidders as the county depositary, and to restrain the county treasurer from depositing the county funds with such bidder, in which neither the State nor any of its prosecuting officers intervene, the circuit court can, for good grounds established, set aside the order and cancel the consequent contract entered into by the county court in pursuance thereto, but having done so it cannot go further and designate the other bidder as county depositary and award to it the county funds. *Denny v. Jefferson County*, 436.

JURIES AND JURORS.

Voir Dire Examination. If the record leaves in doubt what questions were asked and what actually occurred upon the *voir dire* examination of the juror, his alleged false answers cannot be reviewed on appeal. *Lamport v. Assurance Corp.*, 19.

JUDICIAL NOTICE.

Record of Another Case. A court does not judicially notice the facts in the record of another and different case—even if determined in the same court. *Smith v. Berryman*, 365.

JURISDICTION.

1. **Nominal Party.** Jurisdiction cannot be conferred by the presence of a merely nominal party. *Barrett v. Stoddard County*, 129.
2. **County as Nominal Party: Motion for Damages on Injunction Bond.** An injunction brought by a bank against the county and another bank to restrain the county treasurer from depositing the county funds in the defendant bank designated as county depository had been dissolved, and on appeal to the Supreme Court the judgment was affirmed. Thereafter upon motion to assess damages on the injunction bond the court rendered judgment for defendant bank in the sum of \$7000, and plaintiffs sued out a writ of error to the Supreme Court. *Held*, that the county was only a nominal party to the proceedings and had no right to file such a motion, because the interest on its deposits, about which the original suit centered, had been paid, and if the revenue laws were involved they were involved only in the original proceeding, which was settled on the former appeal; hence, the Supreme Court has no jurisdiction of the writ of error. *Ib.*
3. **Of Circuit Courts: Accounting: Trust Fund: Suit Against Executors.** A petition, filed by plaintiff in his individual capacity, having for its object an accounting in respect to a trust, under which he held certain property, both real and personal, conveyed to him by a testator under separate contract, to be held, managed and disposed of by plaintiff for the purpose of reimbursing himself for money advanced and services performed by him for the benefit of said testator, and naming the executors of a residuary legatee named in said testator's will as defendants, states a cause of action for equitable cognizance in the circuit court, and the jurisdiction to take the accounting does not reside in the probate court. *Johnston v. Grice*, 423.
4. **—: —: Converse of Proposition.** The probate court has no jurisdiction to entertain a petition filed by executors under a will, asking for a decree declaring that an absolute conveyance made by testator be adjudged an equitable mortgage, and that the grantee be required to account for his stewardship as trustee thereunder; and the converse of said proposition, were the situation of the parties reversed, must be true. *Ib.*
5. **Of Probate Court: Equitable Matters: Accounting.** The probate court is not a court of general equitable jurisdiction, although it may, like other courts of law, consider and determine questions of an equitable nature incident to the exercise of its statutory jurisdiction. It may settle the accounts of executors and administrators made by them in the performance of their duties as such, but not their accounts involved in transactions in other capacities, whether as trustees or as individuals. *Ib.*
6. **—: Death of Beneficiary of Trust: Trustee Named as Executor.** Plaintiff was a surety on the bond of a guardian, and upon his default paid a large sum of money for him, and by way of reimbursement the guardian conveyed to him certain real estate, whereupon he promised the guardian that he would return to him whatever he could save above the debt he had been required to pay and the cost of maintenance and compensation for his service. For six years he administered the trust, after which the guardian died leaving a will in which plaintiff was appointed executor and two other persons were designated as residuary legatees. One of these persons assigned his interest to the other, and died leaving a will in which he named a third person as legatee and appointing two of the defendants as executors.

JURISDICTION—Continued.

The trustee sues in his individual capacity for an accounting of the trust estate, naming the surviving legatee under the guardian's will and the executors under the other legatee's will as defendants. *Held*, that the death of the guardian had no effect upon the plaintiff's rights or duties under the terms of the trust, although he himself was the beneficiary holding and managing the property for the purpose of paying a debt due him from the guardian, and he was subsequently named by the guardian as executor of his will, and two of the defendants are executors of the will of one of the residuary legatees named in the guardian's will. The probate court has no jurisdiction to settle the account pertaining to the trust estate, but it is one of equitable cognizance in the circuit court, since the account pertains to the execution of the trust, and not to the execution of the guardian's will or the will of said residuary legatee, neither of whom had power by will to change the terms of the trust. *Ib.*

7. **Construction of Federal Statute.** The Supreme Court does not have appellate jurisdiction of a cause wherein a railroad company was fined one thousand dollars for shipping cars of cattle from Iowa into Missouri without having a certificate of inspection attached to the waybill, as provided by Sec. 717, R. S. 1909, on the theory that the Federal law on the subject has supplanted the state statute, and wherein the position of the State is not that the Federal statute is void, or that Congress had no power to pass it, but that it does not cover the subject-matter. The case does not involve the validity of the Federal statute, or the constitutionality of the State statute, but merely the construction of the Federal act. *State v. C. M. & St. P. Ry. Co.*, 520.

JUSTICE OF PEACE, SALARY. See *Counties*, 3.

LACHES.

Enhancing Value by Building Railroad. The true owner cannot be charged with laches for delay in asserting title for that defendant, in his work in promoting and building railroads, had brought these commercial conveniences so close to the land as to greatly increase its value. *Lewis v. Barnes*, 377.

LANDS AND LAND TITLES.

1. **Quieting Title: Suit in Equity: Cancellation of Deed: Cloud on Title.** An answer asking the court to cancel the deed upon which plaintiff relies to establish his title, as a cloud upon the defendant's title, and a judgment which actually grants this equitable relief, convert the action to quiet title into a suit in equity, and authorize the appellate court to weigh the conflicting evidence.
Held, by FARIS, J., dissenting, with whom BOND, J., concurs, that, in order to entitle defendant to equitable relief, and convert the action into a suit in equity, some defense bottomed on well-known equitable grounds must be pleaded, and that a prayer to cancel a deed in plaintiff's chain of title, which in its final analysis amounts only to a contention that defendant's title is better than plaintiff's, does not plead any equitable ground; and the action being one at law, the appellate court cannot settle a conflict on the substantial evidence, but must accept the finding of the trial court sitting as a jury. *Lewis v. Barnes*, 377.
2. **Filing Deed: Date as Shown by Index.** The date the deed was deposited in the office of the Recorder of Deeds, as shown by the "Abstract and Index of Deeds" required by law to be kept, de-

LANDS AND LAND TITLES—Continued.

termfnes the date on which the instrument was filed, and not the certificate on the deed reciting that it was "filed for record" on a subsequent date.

Held, by GRAVES, C. J., concurring, with whom a majority concur, that a deed is filed for record when it is presented to and left with the Recorder of Deeds for record, and the neglect of the Recorder to actually file or record it cannot defeat the rights of a grantee who has actually left it with him for record, and if the Recorder has wilfully or negligently failed to file and record a deed to a homestead oral proof of the fact of its deposit with him is admissible; and, in an action to quiet title, converted by the answer and judgment into a suit in equity, it will be held by the appellate court that a memorandum on the deed in the handwriting of the Recorder reciting that it had been filed in his office on January 6, 1872, and entries in the "direct" and "indirect" parts of the Index Record showing the same date of filing, show a filing on that date, and such fact is not overcome by a certificate attached to the deed and bearing date of July 19, 1872, in which it was stated the instrument was filed on said July 19, 1872, the Deputy Recorder, who made it, testifyin^g, that he did not know how the body of the certificate bore the date of July 19, 1872, unless it was a mistake—it being apparent that the deed was filed January 6th, but, was not actually recorded until July 19th.

Held, by FARIS, J., dissenting, with whom BOND, J., concurs, that, the cause being an action at law, and the substantial evidence as to the date of the filing of the deed being in sharp conflict, it was for the trial court sitting as a jury to determine its probative force, and his finding that it was filed for record on July 19th the appellate court cannot review; and that the announcement in the main opinion that the direct and cross entries in the Index Record take precedence in comparative probative force over a contrary recital in a solemn sealed certificate made by the Recorder both upon the record and the deed itself, is not in consonance with what has been said by this court in a number of cases. Lewis v. Barnes, 377.

3. ———: Homestead: Subject to Sale for Antecedent Debts. Under the Homestead Act of 1865 the date of filing the deed conveying land actually occupied by the grantee at the time, fixed the date of the beginning of the homestead, which could not be sold by his administrator to pay debts thereafter contracted by him, unless legally charged thereon in his lifetime; and the title to said homestead, upon the death of the homesteader, vested in his widow, subject to the rights of occupancy by his minor children, and it could not be sold by the administrator, even though so ordered by the probate court, to pay such debts. Ib.
4. Homestead Act of 1865: Liberal Construction: Sale to Pay Debts. Unless the debt of the homesteader, created subsequent to the time he occupied the land as a homestead and filed his deed for record, was legally charged upon the land during his lifetime, in the manner provided by the laws then in force (G. S. 1865, p. 450, sec. 5), no title passed by the administrator's sale made in pursuance to an order of the probate court to pay the debt; and no strained construction of the law will be made in aid of the asserted title acquired by the purchaser at such sale. Ib.
5. ———: Reforming Mortgage: Abandonment of Lien: Sale to Pay General Debts. If the homesteader had really intended that an executed mortgage should convey the homestead and had failed to do

LANDS AND LAND TITLES—Continued.

so because the land was incorrectly described, a proceeding in equity to reform the instrument so as to "legally charge" the land with the debt might have been maintained after the homesteader's death; but, as the statute of 1865 vested the title of the homestead lands in the widow, such a suit could not have been maintained without making her and the minor children parties, and if brought against the administrator alone a judgment pretending to foreclose the mortgage was void. But in this case the facts show that the administrator abandoned his lien, and caused the administrator and probate court to sell the homestead lands to pay general debts, his own among others, and it is now too late for the defendant who claims under said administrator's deed to abandon that claim and claim under an old lien which he never sought to enforce. Ib.

6. **Limitations: Thirty-Year Statute: Strictly Construed.** An acquisition of land in the manner prescribed by the thirty-year Statute of Limitations (Sec. 1884, R. S. 1909) contains no equity that calls upon the courts to be astute in devising ways not directly pointed out by it to support it; the right has no necessary foundation in merit, and he who claims lands under it must look only to the law for support. Ib.

7. —: —: Directed to Right to Possession: When Begins to Run: Remaindermen. The thirty-year Statute of Limitation is directed against such persons only as claim or might claim possession of the land; it does not defeat those who owned the title, but were not entitled to possession. For failure to pay taxes it imposes the penalty of forfeiture against the true owner who was entitled to possession and whose duty it was to pay them, but it does not impose such penalty against him who had no such possessory right as made it his legal duty to pay the taxes.

Held, by GRAVES, J., concurring, with whom a majority concur, that it is the duty of the life tenant to pay the taxes, and the law does not impose that duty upon the remainderman.

Held, also, that the statute does not begin to run until the person entitled to possession both quits possession and quits paying taxes. Ib.

8. —: —: —: Remarriage of Widow: Right of Husband to Possession: Right of Widow's Grantee. The homesteader died in 1873; in 1875 the widow remarried, and her husband died in 1911, and in 1912 she conveyed the land to her only surviving child, the plaintiff, the other child of the homesteader having died in infancy after his death. No lien was legally charged against the land by the homesteader during his lifetime, and therefore under the then statute the title, upon his death, passed to the widow, for the use and occupancy of herself and his children during their minority. The property was sold by the administrator in 1876, under an order of the probate court, to defendant's grantor, to pay the homesteader's debts. At that time it was not encumbered with taxes. *Held*, that after the widow's remarriage her husband was entitled to the possession, and, as the property was then unencumbered with taxes, the thirty-year statute had not begun to run against her, nor did it begin to run against her or her grantee until the husband's possessory right terminated, and since thirty years have not elapsed since then the thirty-year statute will not operate to divest title out of the widow's grantee and vest it in defendant, although he and those under whom he claims have been in possession under the administrator's void deed and have paid taxes for more than thirty-five years.

LANDS AND LAND TITLES—Continued.

Held, by GRAVES, C. J., concurring, with whom a majority concur, that upon the widow's second marriage, the law separated the whole estate in the land then vested in her, into two estates, namely, the possessory right or life estate of the husband, and the remainder in her, and thereafter the right of possession was in the husband during his life, and the thirty-year statute did not prior to her said second marriage begin to run against her unless she had ceased to pay taxes and had abandoned the possession.

Held, also, whether or not the widow paid the taxes prior to her remarriage, she will not be held to have quit the possession until defendant through his void deed claimed the right to possession, and the burden is on him to show that she had sooner abandoned possession, and she did not do that by going away to another state, leaving a tenant in charge and directing her agent to collect the rents and after paying the taxes send the balance to her. Lewis v. Barnes, 377.

9. **Estoppel in Pais.** *Held*, by GRAVES, C. J., with whom a majority concur, that a married woman with no right of possession and no right to sue for possession of land, could not, prior to the Married Woman's Act of 1889, be estopped by acts *in pais*. Ib.
10. **Limitations: Thirty-Year Statute: Possessory Right of Husband: Married Woman's Act.** Prior to the enactment of the Married Woman's Act of 1889, the right to possession of the wife's lands was in the husband, and that right in all lands antecedently acquired was not affected by that act. Said act was prospective in its operation. Ib.
11. ———: **Ten-Year Statute: Possession of Administrator.** Adverse possession cannot be founded upon a wrongful taking possession of estate lands by the administrator, even though while it was in his possession it was sold to defendant under a void judgment. The administrator has no title to decedent's real estate, and his official position cannot constitute a claim of title, or furnish a basis for adverse possession. Ib.
12. **Laches: Enhancing Value by Building Railroad.** The true owner cannot be charged with laches for delay in asserting title for that defendant, in his work in promoting and building railroads, had brought these commercial conveniences so close to the land as to greatly increase its value. Ib.
13. **Estate Tail: Title in Remainderman.** An estate tail at common law is abolished by statute, and the tenant of the fee tail becomes a life tenant, with remainders in fee simple to the person to whom the estate would first pass on the death of the first grantee. King v. Theis, 416.
14. **Life Estate: Joint Tenants.** Unless the testator expressly so declares in his will the devisees are not joint tenants of the life estate. Ib.
15. ———: **Partition: Binding on Remaindermen.** A partition of real estate, which appertains only to a life estate, in the absence of fraud, is binding on the remaindermen of the respective life tenants, the remaindermen in that respect being represented by the owners of the preceding estate. Ib.
16. ———: **Death of Remainderman: Partition: Limitation.** Where testator devised his entire farm to a daughter for life or until her marriage, and, in the event of her marriage, to his two married

LANDS AND LAND TITLES—Continued.

daughters and a son as tenants in common for life, with remainder in fee in their respective bodily heirs, and said daughter married, and partition suit was brought, to which all the named devisees were parties, the portion allotted to the son, upon his death in 1899 leaving neither wife nor descendants, vested in the surviving daughters, and the action of the children of one of them to recover that portion, brought on March 28, 1914, was barred, by the ten-year Statute of Limitations and Sec. 1883, R. S. 1909, by a foreclosure sale under a deed of trust placed thereon by the son in his lifetime and the continuous possession thereunder by the purchaser, if said daughter's disability of coverture was removed by her husband's death on December 25, 1904, and she died in 1912 without instituting suit. Ib.

17. **Mortgage: To Defeat Execution: Fraud.** The facts in this case show that the deed of trust held by plaintiff and subsequently released by him, was executed by the mortgagor to defeat execution under a judgment obtained by defendants on a debt due from him to them. *Rehm v. Alber*, 452.
18. **—: To Secure Former Gift.** A deed of trust given to plaintiff by the husband of his only child, in an attempted payment for a lot, which had previously been given to the husband, with no intention of receiving any consideration therefor, and made and placed upon record with the intention of placing the lot beyond the reach of the mortgagor's existing creditors, is fraudulent. Ib.
19. **—: Release: Reinstatement After Sale Under Execution: Notice.** A purchaser at execution sale, without actual notice of any outstanding title or claim, gets title through his sheriff's deed as against the mortgagee who, having received a warranty deed in consideration of a cancellation of the debt, by mistake previously released the deed of trust on the margin of its record, at a time when the judgment was a subsisting lien on the property. Ib.
20. **—: —: —: Notice at Date of Purchase.** In August defendants brought suit against the mortgagor in a deed of trust, who was plaintiff's son-in-law, and who in September made a deed of trust to secure a note for \$1,000 made payable to plaintiff. In April judgment was obtained, and in June the mortgagor conveyed the lot to plaintiff by warranty deed, reciting as its consideration the surrender of the note, and the next day the deed was recorded and plaintiff entered satisfaction of the deed of trust on the margin of the record, now claiming that he made the release in ignorance of the fact that said judgment was a lien on the property. Two years later execution was issued and levied and defendants became the purchasers and received a sheriff's deed. Plaintiff asks that the release and warranty deed be canceled, and the deed of trust be reinstated and declared a prior lien. He alleges that defendants knew of the existence of the deed of trust when they obtained their judgment, but does not charge them with notice of any equities when they purchased two years later. *Held*, that, admitting the deed of trust was bona-fide, it cannot be reinstated, but the defendants took the title by their sheriff's deed; but the facts show that the deed of trust was fraudulent, contrived for the purpose of enabling the maker to defraud defendants, and that plaintiff knew of the existence of the judgment when he released the deed of trust. Ib.

LARCENY.

1. **Hog: Carcass.** A defendant charged with stealing hogs cannot be convicted of stealing the carcass of a hog. The carcass of a hog, by whatever name called, is not a hog. The word "hog" means a live animal. *State v. Hedrick*, 502.
2. _____: _____: **Venue: Failure of Proof.** Defendant was charged with stealing four black hogs in Reynolds County and was indicted in that county. The evidence shows that the hogs were stolen and killed in Dent County, and thereafter their carcasses were taken by defendant and two other persons into Reynolds County, where they were cleaned and divided among them. *Held*, that there was a total failure of proof. Defendant could not under the indictment be convicted of stealing the carcasses of hogs in Reynolds County, because he was not so charged. *Ib.*
3. _____: _____: **Statute.** The statute (Sec. 4535, R. S. 1909) making it grand larceny to steal any "horse, mare, gelding, colt, filly, ass, mule, hog or neat cattle" shows on its face that it is not capable of being construed to embrace those animals when dead. *Ib.*

LIFE ESTATE.

1. **Estate Tail: Title in Remainderman.** An estate tail at common law is abolished by statute, and the tenant of the fee tail becomes a life tenant, with remainders in fee simple to the person to whom the estate would first pass on the death of the first grantee. *King v. Theis*, 416.
2. **Joint Tenants.** Unless the testator expressly so declares in his will the devisees are not joint tenants of the life estate. *Ib.*
3. **Partition: Binding on Remaindermen.** A partition of real estate, which appertains only to a life estate, in the absence of fraud, is binding on the remaindermen of the respective life tenants, the remaindermen in that respect being represented by the owners of the preceding estate. *Ib.*

LIMITATIONS.

1. **Widow's Election: Acquiescence in Will.** In the absence of evidence to the contrary, it must be presumed that the widow, who probated her husband's will and qualified thereunder as executrix, and which gave her a life estate in all his lands, elected to take under the will; and being thus seized, she could not deal with the property in such a manner as to start the Statute of Limitations running adversely to the rights of the remaindermen. *Ross v. Church*, 96.
2. **Conveyance by Life Tenant.** A deed by the life tenant conveys to the grantee no such title as will enable him to successfully assert an interest in the land after the life tenant's death. The life tenant's interest terminated upon her death, and cannot be enlarged by her conveyance. *Ib.*
3. **As to Remaindermen.** Whatever may have been the character of the holding of the land by the grantee of the life tenant, he cannot claim title by limitations, or defeat the rights of remaindermen, if sufficient time has not elapsed since the life tenant's death to sustain a claim under the Statute of Limitations. *Ib.*
4. **Thirty-Year Statute: Strictly Construed.** An acquisition of land in the manner prescribed by the thirty-year Statute of Limitations

LIMITATIONS—Continued.

(Sec. 1884, R. S. 1909) contains no equity that calls upon the courts to be astute in devising ways not directly pointed out by it to support it; the right has no necessary foundation in merit, and he who claims lands under it must look only to the law for support. *Lewis v. Barnes*, 377.

5. ———: Directed to Right to Possession: When Begins to Run: Remaindermen. The thirty-year Statute of Limitations is directed against such persons only as claim or might claim possession of the land; it does not defeat those who owned the title, but were not entitled to possession. For failure to pay taxes it imposes the penalty of forfeiture against the true owner who was entitled to possession and whose duty it was to pay them, but it does not impose such penalty against him who had no such possessory right as made it his legal duty to pay the taxes.

Held, by GRAVES, J., concurring, with whom a majority concur, that it is the duty of the life tenant to pay the taxes, and the law does not impose that duty upon the remainderman.

Held, also, that the statute does not begin to run until the person entitled to possession both quits possession and quits paying taxes. *Ib.*

6. ———: ———: Remarriage of Widow: Right of Husband to Possession: Right of Widow's Grantee. The homesteader died in 1873; in 1875 the widow remarried, and her husband died in 1911, and in 1912 she conveyed the land to her only surviving child, the plaintiff, the other child of the homesteader having died in infancy after his death. No lien was legally charged against the land by the homesteader during his lifetime, and therefore under the then statute the title, upon his death, passed to the widow, for the use and occupancy of herself and his children during their minority. The property was sold by the administrator in 1876, under an order of the probate court, to defendant's grantor, to pay the homesteader's debts. At that time it was not encumbered with taxes. *Held*, that after the widow's remarriage her husband was entitled to the possession, and, as the property was then unencumbered with taxes, the thirty-year statute had not begun to run against her, nor did it begin to run against her or her grantee until the husband's possessory right terminated, and since thirty years have not elapsed since then the thirty-year statute will not operate to divest title out of the widow's grantee and vest it in defendant, although he and those under whom he claims have been in possession under the administrator's void deed and have paid taxes for more than thirty-five years.

Held, by GRAVES, C. J., concurring, with whom a majority concur, that upon the widow's second marriage, the law separated the whole estate in the land then vested in her, into two estates, namely, the possessory right or life estate of the husband, and the remainder in her, and thereafter the right of possession was in the husband during his life, and the thirty-year statute did not prior to her said second marriage begin to run against her unless she had ceased to pay taxes and had abandoned the possession.

Held, also, whether or not the widow paid the taxes prior to her remarriage, she will not be held to have quit the possession until defendant through his void deed claimed the right to possession, and the burden is on him to show that she had sooner abandoned possession, and she did not do that by going away to another state, leaving a tenant in charge and directing her agent to collect the rents and after paying the taxes send the balance to her. *Ib.*

LIMITATIONS—Continued.

7. **Thirty-Year Statute: Possessory Right of Husband: Married Woman's Act.** Prior to the enactment of the Married Woman's Act of 1889, the right to possession of the wife's lands was in the husband, and that right in all lands antecedently acquired was not affected by that act. Said act was prospective in its operation. *Lewis v. Barnes*, 377.
8. **Ten-Year Statute: Possession of Administrator.** Adverse possession cannot be founded upon a wrongful taking possession of estate lands by the administrator, even though while it was in his possession it was sold to defendant under a void judgment. The administrator has no title to decedent's real estate, and his official position cannot constitute a claim of title, or furnish a basis for adverse possession. *Ib.*
9. **Life Estate: Death of Remainderman: Partition.** Where testator devised his entire farm to a daughter for life or until her marriage, and, in the event of her marriage, to her two married daughters and a son as tenants in common for life, with remainder in fee in their respective bodily heirs, and said daughter married, and partition suit was brought, to which all the named devisees were parties, the portion allotted to the son, upon his death in 1899 leaving neither wife nor descendants, vested in the surviving daughters, and the action of the children of one of them to recover that portion, brought on March 28, 1914, was barred, by the ten-year Statute of Limitations and Sec. 1883, R. S. 1909, by a foreclosure sale under a deed of trust placed thereon by the son in his lifetime and the continuous possession thereunder by the purchaser, if said daughter's disability of coverture was removed by her husband's death on December 25, 1904, and she died in 1912 without instituting suit. *King v. Theis*, 416.
10. **Not Pleaded.** Evidence in support of the Statute of Limitations is admissible under a general denial. *Ib.*

MANDAMUS.

1. **Against County Court: By Justice of Peace for Salary: Remedy.** The Act of March 23, 1915, provided for four justices of the peace in townships containing a designated number of inhabitants, to be paid an annual salary of \$2000, payable monthly out of the county treasury. Relator was one of the four in such a township, which was the only one of the designated population in the State. He filed a written claim with the county court for salary then due and demanded payment. The court refused to allow the claim on the ground that there was no law authorizing its allowance. He then brought this suit by mandamus against the county court to compel them to pay his salary. *Held*, that, though the Legislature may have power to provide for the payment of salaries to justices of the peace out of the county treasury, it cannot take away from the county the right to call in question both the facts and the law on which the payment of such a salary is demanded; and since the question of whether said statute is constitutional is a judicial one, and the statute gives to relator the right to appeal from the action of the county court in refusing to issue the warrant, and he has, besides, the right to sue the county for his salary, he cannot proceed by mandamus against the county court to enforce that right. *State ex rel. v. Hill*, 206.
2. **Demurrer to Alternative Writ: Admissions and Facts.** A demurrer by respondents to the alternative writ in mandamus confesses the truth of the allegations therein contained, and the facts of the case are to be ascertained from the writ. *State ex rel. v. West*, 304.

MANDAMUS—Continued.

3. **Discretion: Controlled by Mandamus.** If the county court was not compelled by the statute to make a different order from the one it did make, but was invested with a discretion to exercise judgment in the matter, its action cannot be controlled by mandamus, unless its exercise was palpably arbitrary. Ib.
4. **County Court Drainage Act: Amendment of 1913: Discretion as to Necessity for Improvement.** Section 5583 of the County Court Drainage District Act of 1913, Laws 1913, p. 272, if considered alone, without reference to the context, or to the succeeding sections of the act, requires the county court to make an order incorporating a drainage district in cases where the owners of a majority of the acres in the proposed district petition therefor. But such a construction would render the next section (Sec. 5584, Laws 1913, p. 273) meaningless and futile, and section 5583 itself unconstitutional and void. The two sections must be read together, and when that is done they authorize the county court, even when a petition for incorporation signed by the owners of a majority of the acres in the proposed district is presented, to determine whether or not the improvement is "necessary for sanitary or agricultural purposes, or would be of public utility or conducive to the public health, convenience or welfare," and a determination by the court, after the filing of a remonstrance and an orderly public hearing, that the proposed improvement is not necessary for any of these purposes, cannot be nullified by mandamus. Ib.
5. **Damages in: Against Respondents After Peremptory Writ.** In a proper situation an independent action for damages will lie to plaintiff in an antecedent mandamus proceeding. Having obtained his peremptory writ plaintiff may, if he show that the return made to the alternative writ by the respondent in the mandamus proceeding was false, have the damages which have accrued to him by reason of such false return assessed either (1) in the mandamus proceeding itself or (2) in an independent action brought for that purpose. But absent a false return, no damages, except costs (and they subject to the court's order), can be recovered in any action brought by relator in the mandamus proceeding against the respondents therein.
Held, by WILLIAMS, J., with whom BLAIR, J., concurs, that whether or not a relator seeking to recover damages resulting from a false return in a mandamus suit must recover his damages in the mandamus proceeding or may proceed in a separate action as in the ancient common law manner of a suit upon a false return, is not for decision in this case, because no mention of a false return is made in the petition, nor does the evidence show that a false return was in fact made, and consequently such question is not for determination in this action. Smith v. Berryman, 365.
6. _____: _____: **False Return.** Within the purview of the common law, and of the present statute (Sects. 2547, et seq., R. S. 1909), no recoverable damages accrue to the relator for that he was compelled to bring mandamus, unless the respondent by making a false return, and thereby raising a false issue of fact, as contradistinguished from pure issues of law, puts the relator to vexation and expense in disproving such false issue of fact. The only difference between the common law and statutes in this respect is that at common law damages were assessed in a separate action, but under the statute they may be assessed in the mandamus proceeding or by independent action; but neither at common law could relator, nor under the statute can he, recover damages unless there was or is a false return. Ib.

MANDAMUS—Continued.

7. _____: _____: **Insufficient Return.** A statement in the peremptory writ issued by the Court of Appeals that respondents in the mandamus case "returned to said court an insufficient cause" for refusing to affirmatively obey the alternative writ, is not a finding, or evidence, that the return was false. *Smith v. Berryman*, 365.
8. _____: _____: **Statement in Opinion.** If it be true that the Court of Appeals in its opinion in the mandamus case found that the return made by respondents to the alternative writ was false, that fact cannot be considered in the trial of the action for damages, nor by the Supreme Court on appeal, unless that opinion is offered in evidence. *Ib.*
9. _____: _____: _____: **Judicial Notice.** A court does not judicially notice the facts in the record of another and different case—even if determined in the same court. *Ib.*
10. _____: _____: **Failure to Perform Ministerial Duty: Waiver.** In an action based on the theory that plaintiff is entitled to damages which have accrued to him at common law by reason of the refusal of respondents in his mandamus suit to perform a ministerial duty, in that, as mayor and city councilmen, they refused to grant him a license to keep a dramshop, he cannot recover, because no such action existed at common law, and none has been created by statute. By asking for his writ of mandamus, relator was compelled to admit, and by operation of law did admit, that he had no adequate remedy by any other action or proceeding.
Held, by WILLIAMS, J., concurring, with whom BLAIR, J., concurs, that plaintiff, having elected to proceed by mandamus to compel the performance of a ministerial duty, thereby abandoned or waived whatever right he theretofore had to bring a common law action for damages resulting from the original refusal of the defendants to perform such ministerial duty. *Ib.*
11. _____: **Action at Law: Discretion.** The extraordinary prerogative writ of mandamus issues from the law side of the court, but it has at least one attribute in common with extraordinary writs of equity jurisdiction, namely, its issuance is within the court's legal discretion. *Ib.*
12. **Election Contest: Notice: Defective and Untimely Service: Waiver: Jurisdiction.** A failure to serve the notice of an election contest for a county office within the time prescribed by statute, and the defect in the manner of service, in that it was served by a private individual instead of by an officer, are waived by a general appearance of the contestee. The parties to the proceeding are the contestant and contestee, and the contest for the title to the office is the subject-matter. Jurisdiction of the subject-matter is conferred by law, and its nonexistence cannot be waived; but service of process has to do with jurisdiction of the persons or parties to the action, and any defect in that service, as to time or manner, or a failure to serve the notice at all, is waived by the contestee's appearance to the merits. [Overruling any contrary ruling in *State ex rel. Woodson v. Robinson*, 270 Mo. 212.]
Held, by GRAVES, C. J., dissenting, with whom BLAIR and WILLIAMS, JJ., concur, that the statute requires the notice to be filed with the clerk, and until it is served in the manner and within the time prescribed by statute and filed with him the court obtains no jurisdiction of the subject-matter or contestee, since it is only a notice so served that can be filed. *State ex rel. v. Cave*, 653.

MANDAMUS—Continued.

13. _____: General and Limited Jurisdiction of Circuit Court. Circuit courts do not exercise a limited jurisdiction in election contests or proceed according to a prescribed and exclusive procedure, but are courts of general jurisdiction. It is immaterial how the right claimed or remedy prayed for originated so long as the court's jurisdiction is not limited by the law creating the one or conferring the other, and no such express limitation is found in the laws governing election contests.

Held, by GRAVES, C. J., dissenting, with whom BLAIR AND WILLIAMS, JJ., concur, that jurisdiction to hear and determine an election contest is not a part of the general common law jurisdiction possessed by circuit courts, but the tribunal and the proceeding are purely statutory, and as the statutes do not give the court jurisdiction of the subject-matter until a notice, served in the statutory manner, is filed with the clerk, the contestee by entering his general appearance does not give the court jurisdiction. *Ib.*

14. **Reinstatement of Cause.** Mandamus is the proper remedy to compel the trial court to reinstate, and to dispose of in the orderly course of procedure, a cause of which it has jurisdiction and which it has dismissed without a hearing. *Ib.*

MANSLAUGHTER. See Murder.**MARRIED WOMEN.**

1. **Widow's Election: Acquiescence in Will: Limitations.** In the absence of evidence to the contrary, it must be presumed that the widow, who probated her husband's will and qualified thereunder as executrix, and which gave her a life estate in all his lands, elected to take under the will; and being thus seized, she could not deal with the property in such a manner as to start the Statute of Limitations running adversely to the rights of the remaindermen. *Ross v. Church*, 96.

2. **Homestead: Act of 1865; Remarriage of Widow: Right of Husband to Possession: Right of Widow's Grantee.** The homesteader died in 1873; in 1875 the widow remarried, and her husband died in 1911, and in 1912 she conveyed the land to her only surviving child, the plaintiff, the other child of the homesteader having died in infancy after his death. No lien was legally charged against the land by the homestecader during his lifetime, and therefore under the then statute the title, upon his death, passed to the widow, for the use and occupancy of herself and his children during their minority. The property was sold by the administrator in 1876, under an order of the probate court, to defendant's grantor, to pay the homestecader's debts. At that time it was not encumbered with taxes. *Held*, that after the widow's remarriage her husband was entitled to the possession, and, as the property was then unencumbered with taxes, the thirty-year statute had not begun to run against her, nor did it begin to run against her or her grantee until the husband's possessory right terminated, and since thirty years have not elapsed since then the thirty-year statute will not operate to divest title out of the widow's grantee and vest it in defendant, although he and those under whom he claims have been in possession under the administrator's void deed and have paid taxes for more than thirty-five years.

Held, by GRAVES, C. J., concurring, with whom a majority concur, that upon the widow's second marriage, the law separated the whole estate in the land then vested in her, into two estates, namely, the possessory right or life estate of the

MARRIED WOMEN—Continued.

husband, and the remainder in her, and thereafter the right of possession was in the husband during his life, and the thirty-year statute did not prior to her said second marriage begin to run against her unless she had ceased to pay taxes and had abandoned the possession.

Held, also, whether or not the widow paid the taxes prior to her remarriage, she will not be held to have quit the possession until defendant through his void deed claimed the right to possession, and the burden is on him to show that she had sooner abandoned possession, and she did not do that by going away to another state, leaving a tenant in charge and directing her agent to collect the rents and after paying the taxes send the balance to her. *Lewis v. Barnes*, 377.

MORTGAGES AND DEEDS OF TRUST.

1. **Reforming: Abandonment of Lien: Sale to Pay General Debts.** If the homesteader had really intended that an executed mortgage should convey the homestead and had failed to do so because the land was incorrectly described, a proceeding in equity to reform the instrument so as to "legally charge" the land with the debt might have been maintained after the homesteader's death; but, as the statute of 1865 vested the title of the homestead lands in the widow, such a suit could not have been maintained without making her and the minor children parties, and if brought against the administrator alone a judgment pretending to foreclose the mortgage was void. But in this case the facts show that the administrator abandoned his lien, and caused the administrator and probate court to sell the homestead lands to pay general debts, his own among others, and it is now too late for the defendant who claims under said administrator's deed to abandon that claim and claim under an old lien which he never sought to enforce. *Lewis v. Barnes*, 377.
2. **To Defeat Execution: Fraud.** The facts in this case show that the deed of trust held by plaintiff and subsequently released by him, was executed by the mortgagor to defeat execution under a judgment obtained by defendants on a debt due from him to them. *Rehm v. Alber*, 452.
3. **To Secure Former Gift.** A deed of trust given to plaintiff by the husband of his only child, in an attempted payment for a lot, which had previously been given to the husband, with no intention of receiving any consideration therefor, and made and placed upon record with the intention of placing the lot beyond the reach of the mortgagor's existing creditors, is fraudulent. *Ib.*
4. **Release: Reinstatement After Sale Under Execution: Notice.** A purchaser at execution sale, without actual notice of any outstanding title or claim, gets title through his sheriff's deed as against the mortgagee who, having received a warranty deed in consideration of a cancellation of the debt, by mistake previously released the deed of trust on the margin of its record, at a time when the judgment was a subsisting lien on the property. *Ib.*
5. _____: _____: Notice at Date of Purchase. In August defendants brought suit against the mortgagor in a deed of trust, who was plaintiff's son-in-law, and who in September made a deed of trust to secure a note for \$1,000 made payable to plaintiff. In April judgment was obtained, and in June the mortgagor conveyed the lot to plaintiff by warranty deed reciting as its consideration the surrender of the note, and the next day the deed was recorded and

MORTGAGES AND DEEDS OF TRUST—Continued.

plaintiff entered satisfaction of the deed of trust on the margin of the record, now claiming that he made the release in ignorance of the fact that said judgment was a lien on the property. Two years later execution was issued and levied and defendants became the purchasers and received a sheriff's deed. Plaintiff asks that the release and warranty deed be canceled, and the deed of trust be reinstated and declared a prior lien. He alleges that defendants knew of the existence of the deed of trust when they obtained their judgment, but does not charge them with notice of any equities when they purchased two years later. Held, that, admitting the deed of trust was bona-fide, it cannot be reinstated, but the defendants took the title by their sheriff's deed; but the facts show that the deed of trust was fraudulent, contrived for the purpose of enabling the maker to defraud defendants, and that plaintiff knew of the existence of the judgment when he released the deed of trust. Ib.

MOTION FOR NEW TRIAL. See New Trial.**MURDER.**

1. **Instruction: Assumption of Defendant's Guilt.** An instruction telling the jury that "flight raises the presumption of guilt, and if you believe from the evidence that the defendant, after having stabbed and killed Philip Carpenter," etc., where the stabbing was not admitted by defendant, but unequivocally denied by him, is erroneous, in that it assumes that defendant "stabbed and killed Philip Carpenter." Even though the great weight of the testimony and defendant's previous extra-judicial confession unerringly point to the falsity of his denial, it is still the province of the jury to decide whether or not it is false. *State v. Mills*, 526.
2. **_____: Flight.** It is proper to give an instruction on the subject of flight where the facts show that defendant four days after the stabbing of deceased left the scene of the crime and went to a distant city and was there shortly afterwards arrested at a place and amid environments which might well argue an attempt at concealment; but the instruction should aptly embody the explanation which defendant gives on the witness stand of his alleged flight, or reason for his presence in said city. Ib.
3. **Impeachment: Former Conviction in Police Court.** It was error to permit the defendant, being tried for a felony, to be asked by the State on cross-examination, in an effort to impeach him as a witness, whether he had ever been convicted of a crime, and upon his denial to permit the State to ask him if he had not been convicted of vagrancy in the police court, and upon his further denial, to call the police judge, in rebuttal, and permit him to show by the records that defendant had been convicted of vagrancy in said court. Ib.
4. **_____: _____: Criminal Offense.** A conviction of vagrancy in a police court in violation of a city ordinance is not a conviction of a "criminal offense" within the purview of Sec. 6383, R. S. 1909. Those words are by the statute (Sec. 4925, R. S. 1909) confined to a conviction of a misdemeanor or felony in violation of a State law. Ib.
5. **Instruction on Manslaughter: Failure to Give.** A failure to instruct on manslaughter in a murder case should be specifically assigned as error in the motion for a new trial. Ib.

MURDER—Continued.

6. _____: When Authorized: No Assault. Insulting actions or gestures without an assault upon the person will not reduce the homicide to manslaughter. Where upon a provocation, unknown to defendant, his companion struck deceased and a fight ensued between them, and while defendant was looking on but taking no part in the fight deceased came near him and struck at him but failed to hit him, and thereupon defendant stabbed and killed deceased, there was no manslaughter in the case, and no instruction on the subject should have been given. *State v. Mills*, 526.
7. Instruction on Circumstantial Evidence. Where not a single element in the case depends for its proof upon circumstantial evidence no instruction on that subject should be given. *Ib.*
8. Accessories: Before the Fact. Where the fight which culminated in death came up suddenly, no words passed between defendant and his companion until deceased was stabbed and fell, and when deceased asked a negro woman who was talking with defendant's companion if there was "anything doing" the companion struck deceased and a fight between them began, and defendant without saying or hearing a word stood by with his knife in hand till a favorable opportunity presented itself and then stabbed and killed deceased, no instruction as to accessories before the fact should be given. *Ib.*

NECESSARY PARTIES. See Parties to Action.**NEGLIGENCE.**

1. Child Near Track: Ordinary Care Towards Persons. An instruction telling the jury that "a motorman in charge of a street car is only required to exercise towards persons near its tracks ordinary care to prevent injury to persons if near the track" would not by using the word "persons" cause the jury to infer that a three-year-old child is to be considered as an adult, and is not error. *Turnbow v. Dunham*, 53.
2. _____: Precaution After Danger Seen. An instruction which tells the jury that before they can find for plaintiff they must find that defendant's motorman was guilty of negligence in not taking such precautions as a reasonably prudent person would have done under the same circumstances, to avoid injuring the three-year-old child, in the street between the curb and track, "after the motorman saw him in a position of danger from being run over by the rear wheels of the car," is erroneous. The rear wheels having run over the child's feet, the instruction relieved defendant of liability if the motorman failed to see him in a position of danger from being run over by them, whether such failure to see was or was not the result of the motorman's negligence. *Ib.*
3. _____: Use of Word Ran. An instruction that assumed that the three-year-old child "ran" towards the car as it passed, where there is no evidence that he ran, while not reversible error, would be more technically accurate if it used the word "move." *Ib.*
4. _____: Contest Between Persons of Equal Standing. Where the rear wheels of a street car ran over the feet of a three-year-old child, and he sues for damages, an instruction telling the jury that the case should be "considered the same as if it was a contest between two persons of equal standing in the community" should not be given, because it is apt to mislead the jury into believing that the defendant owed to the child no greater duty to look

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- out for its safety that it owed to an adult under like circumstances. Ib.
5. **Unavoidable Accident: Instruction.** Where the issue raised by the facts is simply one of negligence *vel non* of the motorman, and there is no evidence of any accident within the proper meaning of the term, an instruction telling the jury that if they believe and find from the evidence that plaintiff's injuries were "due to an unavoidable accident and not to any negligence of the motorman," should not be given. Ib.
6. **Approximate Cause: Undefined.** The use of the words "approximate cause" in an instruction, without defining or explaining the term, tends to mystify, rather than to aid the jury in reaching a correct conclusion. Ib.
7. **Child in Street: Demurrer to Evidence.** When a demurrer to the evidence is considered, plaintiff is entitled to have it viewed in its most favorable light; and where there is evidence tending to show that a child less than three years of age, unattended, stepped from the curb into the street as the street car slowly approached; that as the front of the car passed him he was standing five feet from the track, to which position he had approached from the curb while the car had traveled twenty feet; that the motorman saw him and watched him only until the front trucks had passed beyond the position of the child, and then ceased watching him and started to increase the speed, a demurrer to the plaintiff's case of damages for negligence should not be given; for evidently after the front trucks passed, the child moved a step or two closer to the car and placed his hands against the side thereof (as some of the evidence tended to show) and was thrown off his feet and fell in such a way that his feet became entangled under the rear wheels, which ran over them. The motorman's duty of exercising ordinary care for the child's safety was not fully performed by watching the child only until danger from the front trucks was passed. Ib.
8. **—: Moving Car Slowly: Lookout.** A motorman seeing a child of tender years on the street moving towards the track does not by moving slowly relieve himself of the duty of keeping a lookout for the child until it is out of danger. Ib.
9. **Pedestrian on Track: Evidence of Signals at Crossing.** Where defendant's unfenced spur track ran through a thickly settled community, and the use of the track by pedestrians had been acquiesced in for years by defendant, and its trains were run over the track not for public convenience but at irregular intervals in hauling coal, evidence that no bell was rung or whistle sounded just before or at the time of backing the loaded cars over the track on which the deceased was walking when struck, is competent, and is not to be excluded on the theory that the statutory duty to give such signals at a road crossing does not pertain to a pedestrian on a track 150 feet from a public crossing. Beard v. Railroad, 142.
10. **—: —: Instruction: Anticipating Pedestrian on Track.** It being the duty of the railroad company to ring the bell or sound the whistle when it approached that portion of its track used for travel by pedestrians, it was error to instruct the jury that their verdict must be for defendant unless the trainmen saw or by the exercise of ordinary care could have seen the deceased in a position of peril and thereafter failed to stop the train in time to avoid striking him, especially when the facts point to the conclusion that the failure to give either of the signals tended to cause

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- the injury. That neither of the trainmen saw the deceased did not lessen the duty to give one or the other signal. Beard v. Railroad, 142.
11. **Instruction: Based on Conjecture: Climbing on Car.** The giving of an instruction which attempts by inference based on conjecture to define the limit of defendant's liability is error. To tell the jury that their verdict must be for defendant if the deceased fell or was thrown under a moving train in an attempt to climb on the cars, where there is no testimony from which the conclusion can reasonably be drawn that he made such an attempt, is error. Ib.
12. **—: Result of Mere Accident.** Where the injury was caused either by the negligence of defendant or that and the contributory negligence of deceased, an instruction that if the injury was the result of a mere accident plaintiff cannot recover, should not be given. Ib.
13. **—: Trespasser.** The deceased was not a trespasser when struck by defendant's train while walking on a portion of its track which ran through a thickly settled community and was much used as a pathway by pedestrians with defendant's acquiescence; and an instruction limiting defendant's liability on the assumption of trespass was erroneous. Ib.
14. **Ordinary Care: Lookout on Rear of Backing Train.** In backing a long train of cars over a portion of its track on which pedestrians had a right to be and frequently traveled, ordinary care requires that a railroad company place some one on the last car to lookout for such persons. Ib.
15. **Principal and Agent: Negligence of Automobile Driver: Liability of Owner: Presumption.** In a suit for damages against the owner of an automobile, for personal injuries due to the negligent driving of the car by the chauffeur, in the absence of the owner, proof that the automobile was owned by the defendant and that the chauffeur was in his general employment raises a presumption that the chauffeur at the time was acting within the scope of his employment and makes a *prima facie* case against the owner resting on the presumption. But such presumption takes flight upon the appearance of evidence of real facts to the contrary.
Held, by WOODSON, J., dissenting, that the court cannot hold as a matter of law that the *prima facie* case was completely overcome and destroyed by the evidence introduced by defendant, but whether or not it was so destroyed is a question for the jury, whose province it is to determine its credibility and weigh its probative force. Guthrie v. Holmes, 215.
16. **—: —: —: Failure to Observe Master's Direction.** Where the chauffeur was directed to take the automobile to the master's garage, which he could have done in an hour, and instead of doing so spent five hours or more driving over the city before (in a drunken state) he negligently ran the car against plaintiff, there is no presumption that at the time of the accident he was acting within the scope of his employment; but in order to hold his master liable for the damage, positive proof that he was in fact at the time of the accident engaged in the performance of duties for the master was required. Ib.
17. **—: —: —: Having Car Repaired.** The fact that, after the master directed the chauffeur to take the automobile to the garage, the chauffeur, who was an experienced mechanic, discovered a "knock" in the engine and, instead of remedying the

NEGLIGENCE—Continued.

- defect himself, which he could easily have done, went to the general garage of cars of like manufacture, and there saw and took into his car the man in charge, does not establish that such trip was within his duties, even though he had been previously instructed to go to a machine shop and have some parts made. Especially is this true, where the facts show that the chauffeur for the next two hours, after making said trip and before the accident occurred, was engaged in a joy-ride and a drunken debauch. Ib.
18. ———: ———: ———: **Slight Deviations from Directions.** Slight deviations from the master's directions to his chauffeur, or incidental things done by him for his own benefit while in the line of his service for the master, will not destroy the presumption that the regularly employed chauffeur, at the time he negligently ran his automobile against a pedestrian, was acting within the scope of his employment. But the acts of the chauffeur in this case were not slight deviations, nor mere incidents of his employment, but destroyed the presumption. Ib.
19. **Independent Causes: Explosion of Dynamite: Substantial Evidence: Question for Jury.** The rule that when the evidence discloses two independent causes of the injury, for one of which defendant is liable and for the other of which he is not, it is incumbent upon the plaintiff to show that the cause for which defendant is liable produced the injury, imposes upon the plaintiff the duty of offering substantial evidence tending to show that the cause for which defendant is liable produced the injury; and that having been done, the jury, under proper instructions, passes upon the question of fact thus involved, just as upon any other such question, and the quantum of evidence necessary to sustain a finding thereon differs not at all from that required on other issues of fact. The appellate court cannot weigh conflicting evidence upon such issue. Holman v. Clark, 266.
20. **Explosion of Dynamite: Independent Contractor: Liability of City.** The use of explosives by an independent contractor in the construction of a sewer, of such character as to necessitate blasting, must be foreseen by the city; but such use is lawful, and having in readiness, near the work, dynamite in proper quantities for use in blasting, is neither necessarily nor so palpably dangerous, when managed in the ordinary way, as to constitute a thing inherently dangerous; and if the explosive so held in readiness becomes, in the circumstances of a particular case, a nuisance by reason of the independent contractor's negligence of method, without more, provided he is not incompetent, he alone, and not the city, is liable for injuries resulting from explosions. Ib.
21. ———: **Negligence in Storing: Proof of Particular Causal Acts.** In determining, after an explosion, whether or not the independent contractor, engaged in constructing a sewer necessitating blasting, had created a nuisance in the street, the locality, the quantity and manner of keeping must be considered, as well as the nature of the explosive and its liability to accidental explosion; and in deciding whether or not a public nuisance existed in connection with the storage of the material which exploded, the question of the manner in which it was kept may enter into consideration; but when it is once determined upon sufficient evidence that such nuisance was maintained, then no particular causal act directly contributing to the explosion need be shown. Ib.
22. ———: **Nuisance on Private Property: Liability of City.** A city is not ordinarily liable for failure to abate a nuisance upon prop-

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- erty of a private owner, no injury to the users of the street being threatened, since that is but a failure to exercise a governmental power. Holman v. Clark, 266.
23. ———: **Nuisance in Street: Maintained by Contractor: Liability of City.** The fact that the independent contractor was engaged in work for the city has nothing to do with the question of whether the city is liable to an owner of property, adjacent to a street, for damages to said property resulting from a nuisance created by said contractor in the street. Ib.
24. ———: ———: ———: ———: **Notice.** In the absence of notice to the city and of facts from which notice can reasonably be inferred, that the contractor, engaged in the construction of a sewer requiring blasting, had taken into the shed erected in the street, in which were a gasoline engine supplied with fuel and used in drilling rock and a large tank containing a reserve supply of gasoline and placed a few feet from the engine, some sticks of dynamite, taken from the usual place of storage near by, which did not explode, the city is not liable in damages for injury to private property abutting on the street, resulting from an explosion in the shed, in which there was no habitual storage of dynamite. Ib.
25. **Speed Ordinance: Invalidity: Pleading.** Where defendant pleads and relies upon a certain ordinance as a defense to plaintiff's charge of negligence, the invalidity of said ordinance should be pleaded, and if not pleaded it cannot be excluded as evidence on the ground that it is invalid. Roper v. Greenspon, 288.
26. ———: **Invalidity Raised at First Opportunity: Waiver.** The invalidity of an ordinance, relied upon by defendant as a defense to plaintiff's action for negligence, like the unconstitutionality of a statute, should be raised at the first open door in the course of orderly procedure in the case, and if not so raised its invalidity is waived; and the ordinance being pleaded as a defense in the answer, the first opportunity for asserting its invalidity in this case was by an averment in the reply. Ib.
27. ———: **Conflict With State Statute: Waiver.** If the answer pleads that plaintiff was guilty of contributory negligence in running his taxicab in excess of a certain speed ordinance pleaded, and plaintiff replies that the ordinance was in force and that he was not driving in excess of its speed rates, the court is not required to decide that said ordinance conflicts with a state statute on the same subject, neither can said ordinance be excluded from evidence on any such ground. Ib.
28. ———: **Exclusion Harmless Error.** If the ordinance fixed a maximum speed of ten miles per hour and there was evidence that plaintiff's taxicab at the time of his injury was being driven by him at the rate of twenty-five or thirty-five miles, and the instruction made ordinary care the measure of plaintiff's duty, it was not harmless but prejudicial error to exclude said ordinance as evidence; for a rate in excess of the ordinance rate was negligence *per se*, and a rate in excess of that speed was contributory negligence and defeated plaintiff's right to recover, and without such ordinance the jury might find that a rate of even thirty-five miles per hour was ordinary care. Ib.
29. **Automobile Speed: Power of City to Regulate.** The Act of 1911 did not expressly or by intendment withdraw from cities the power to regulate the speed of automobiles upon their streets, nor does such act deprive cities of their power to enact valid ordinances

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- providing reasonable speed and other regulations in the use of streets by automobiles. Ib.
30. **Ordinance: Unlighted Wagon.** Where defendant's long-reach wagon, loaded with long steel beams, extending some eight feet beyond the hind axle, stalled at the intersection of two streets after nine o'clock at night, they were guilty of ordinance negligence for failure to have lights on the wagon, in obedience to an ordinance requiring all such vehicles, while in use upon the streets between the hours of sunset and sunrise, to "display one or more lights or lanterns on the outside of such vehicles, visible from front and rear," and are liable to the driver of an automobile who saw the wagon, but did not see the steel beams, with which he came in contact, and which were of the same color as the asphalt pavement—unless his right to recover is barred by his contributory negligence in driving at an excessive speed. Ib.
31. **Common Law: Blocking Street.** Evidence that a long-reach wagon, loaded with long steel beams, extending some eight feet beyond the hind axle, stalled after nine o'clock at night at the poorly-lighted intersection of two streets; that it sank down into the asphalt pavement and remained there for thirty minutes or more; that the street which crossed the one in which it was traveling was a continuously used highway; that the wagon and beams blocked the whole of the south side of that highway, which was the side used by automobiles going east, as plaintiff's was; that neither the owners of the wagon nor their servants did anything in the way of performing their duty to the traveling public by way of warning or signals, and that plaintiff's taxicab collided with the steel beams and he was injured, is such evidence of common law negligence as entitled plaintiff to go to the jury on that issue. Ib.
32. **Contributory: Question for the Jury.** Where there is conflicting evidence on every vital question touching the negligence of plaintiff, the question of his contributory negligence is an issue for determination by the jury; and notwithstanding the evidence on that question preponderates in favor of defendants, the appellate court cannot declare as a matter of law that plaintiff was guilty of such contributory negligence as bars a recovery, even though all the testimony except his own, which is positively to the contrary, shows recklessness on his part at the time of the accident. Ib.
33. **In Construction of Track: Curve Near Coal Bin.** A spur track passed along the north side of a poultry house in a westerly direction, thence across the street on a thirty-degree curve to the south, which ended in a tangent a few feet west of the street, and extended from that point a distance of fifty-two feet along the north side of a coal bin of an electric light plant, in an almost straight line and at a practically uniform distance of four feet from the bin. The effect of the curved track was that a car forty-two feet long standing at the coal bin in a position to be unloaded stood at a distance sufficient to permit a switchman to stand or move between the car and the bin with safety, but when the car moved eastward, at his signal, its middle portion, owing to the curve in the track, swung in towards the inside of the curve and slowly moved nearer to the coal bin, and crushed him between the car and bin. *Held*, that under the circumstances the construction of the curved track so as to permit the switchman to be injured in the manner he was injured was not a neglect of the master's duty to provide a reasonably safe place in which

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- the servant might perform his appointed work, there being no showing that the company did not do its best, consistently with successful operation, in the location and construction of the track on the line adopted. *Morris v. Pryor*, 250.
34. ———: ———: **Reasonably Safe: Absolute Safety.** The term "reasonably safe" does not mean that a railroad company is required to construct its track, in its relation to the physical features of the electric light plant it is required to serve, in such a manner that the operation of trains thereon will be absolutely safe, even to careful employees. *Ib.*
35. ———: ———: **Assumption of Risks.** Railroad trainmen are surrounded with dangers to life and limb under the most favorable circumstances, the risk of which they assume in their employment. *Ib.*
36. ———: ———: ———: **Primary Duty of Railroad: Latitude of Judgment in Performance.** The primary duty of a railroad is to render that service to the public which the law imposes as an incident to the calling and the exercise of its franchise. In the matter of supplying appliances to meet that duty under diverse conditions it must be allowed a latitude of judgment, since variable conditions are important stones in the foundation of the doctrine of assumption of risk; and if its officers and servants undertake the work of performing that duty, under circumstances charging them with full knowledge of all the dangers and difficulties incident to its successful prosecution with the facilities available, without complaint or other expression of dissatisfaction, they assume the risk of injuries resulting from the use of such facilities, even though they would not have occurred in the use of some other instruments or situation designed to accomplish the same purpose. *Ib.*
37. ———: ———: **Experienced Employee: Heedlessly Choosing Dangerous Situation.** The railroad company cannot be charged with negligence in constructing a curved spur track leading to a coal bin of an electric light plant, if the injured switchman, foreman of the crew, experienced in the performance of his work, knowing the tendency of the middle portion of a car to swing in towards the inside of the curve, heedlessly took his position between the car and the bin, when the other side was safe and customarily used, and gave the signal to move, and heedlessly turned his back to the car when it began to move, and was crushed when the car swung in towards the bin, when if he had exercised prudence for his safety a few steps would have enabled him to avoid the accident. *Ib.*
38. **Federal Employers' Liability Act: Issues Upon Demurrer.** Since contributory negligence is not under the Federal law a bar to a recovery by an employee injured in the course of his employment while engaged in interstate commerce, a demurrer to the evidence can be sustained only on one of two theories, namely, (1) that there was no negligence on the part of defendant, or (2) that the plaintiff assumed the risk, and one or the other of these must appear as a matter of law. *Williams v. Pryor*, 613.
39. **Assumption of Risk: When Possible.** There can be no assumption of risk except in cases in which the relation of master and servant exists. But that relation may be by either an express or an implied contract. *Ib.*

NEGLIGENCE—Continued.

40. _____: **What Risks: Duty of Master.** A servant employed to do a given work assumes the ordinary and usual risks incident to such employment. But, that admitted, it still is the duty of the employer to furnish the employee a reasonably safe place in which to perform his work, and reasonably safe tools with which to perform it. Those duties are non-delegable in the sense that the master is always responsible for the faithful performance of them. Ib.
41. _____: **Defective Tool: Question for Jury.** If the tool furnished by the master was not, according to plaintiff's evidence, reasonably safe for the performance of the work assigned by the master to the servant, the question of the master's negligence is one for the jury. Ib.
42. _____: _____. The furnishing of a tool which is not reasonably safe for the performance by the servant of the work assigned to him by the master, is negligence on the part of the master, and the servant does not assume a risk growing out of the master's negligence. Ib.
43. _____: **Patently Defective Tool: Continuing to Use.** If the tool furnished by the master is so patently defective that an ordinarily careful and prudent man would not use it, a use of it by the servant is negligence, but under the Federal law that negligence, being contributory, does not bar a recovery, nor does the servant assume the risk growing out of the master's negligence in furnishing such a tool. Ib.
44. _____: **Common-Law Rule: Use of Glaringly Defective Tool: Contributory Negligence.** In cases in which the doctrine of assumed risk can be invoked such assumed risk must be determined by the common-law rule as that rule has been announced by the Missouri courts, and it is (1) that the servant never assumes a risk that is the outgrowth of the master's negligent act, and (2) that the servant cannot recover on the ground of his own negligence, which in Missouri is denominated contributory negligence, and the use of a glaringly defective tool would be such, but under the Federal statute such contributory negligence does not bar recovery, nor does the servant because of such contributory negligence assume the risk occasioned by the master's negligence. Ib.
45. _____: **Simple-Tool Doctrine.** It is negligence of the master to furnish a tool which is not reasonably safe for use by the servant in the performance of his work, whatever be the character of the tool. In its final analysis the so-called simple-tool doctrine is nothing more than that of contributory negligence, which is no defense under the Federal statute and does not fasten assumption of risk on the servant. Ib.
46. _____: **More Dangerous of Two Methods.** The choosing by the servant of the more dangerous of two methods of performing the work assigned to him, is contributory negligence on his part, and does not defeat his right to recover for injuries which result from the master's negligence in failing to furnish him a reasonably safe tool for the performance of his work. Ib.

NEW TRIAL.

Supplemental Motion For: Untimely. Matters attempted to be preserved by a supplemental motion for a new trial filed out of time cannot be considered. *Lamport v. Assurance Corp.*, 19.

NOTICE.

1. **Deposition.** Authority to take depositions is purely statutory, and while they may be taken conditionally, no officer, who is without a commission issued out of a court of record, has authority to take testimony or compel the attendance of witnesses by issuing subpoenas until the proper service of a proper notice of the time and place. *Burnett v. Prince*, 68.
2. ———: **Subpoena Before Notice: Subsequent Service.** A subpoena issued before notice to take deposition is served, is issued without authority. And being unauthorized when issued, a subsequent service of the notice and subpoena at the same time will not give it validity. *Ib.*
3. ———: **Notice Naming Wrong Place.** A notice to take depositions in a suit pending in Independence, which names Kansas City instead of Independence as the place where the suit is pending, will not authorize the officer to enforce the attendance of witnesses. The statute makes the courts at the two places distinct and separate courts. *Ib.*
4. **Release of Mortgage: Execution: Notice at Date of Purchase.** In August defendants brought suit against the mortgagor in a deed of trust, who was plaintiff's son-in-law, and who in September made a deed of trust to secure a note for \$1,000 made payable to plaintiff. In April judgment was obtained, and in June the mortgagor conveyed the lot to plaintiff by warranty deed, reciting as its consideration the surrender of the note, and the next day the deed was recorded and plaintiff entered satisfaction of the deed of trust on the margin of the record, now claiming that he made the release in ignorance of the fact that said judgment was a lien on the property. Two years later execution was issued and levied and defendants became the purchasers and received a sheriff's deed. Plaintiff asks that the release and warranty deed be canceled, and the deed of trust be reinstated and declared a prior lien. He alleges that defendants knew of the existence of the deed of trust when they obtained their judgment, but does not charge them with notice of any equities when they purchased two years later. *Held*, that, admitting the deed of trust was bona-fide, it cannot be reinstated, but the defendants took the title by their sheriff's deed; but the facts show that the deed of trust was fraudulent, contrived for the purpose of enabling the maker to defraud defendants, and that plaintiff knew of the existence of the judgment when he released the deed of trust. *Rehm v. Alber*, 452.

NUISANCES.

1. **On Private Property: Liability of City.** A city is not ordinarily liable for failure to abate a nuisance upon property of a private owner, no injury to the users of the street being threatened, since that is but a failure to exercise a governmental power. *Holman v. Clark*, 266.
2. **In Street: Maintained by Contractor: Liability of City.** The fact that the independent contractor was engaged in work for the city has nothing to do with the question of whether the city is liable to an owner of property, adjacent to a street, for damages to said property resulting from a nuisance created by said contractor in the street. *Ib.*
3. ———: ———: ———: **Notice.** In the absence of notice to the city and of facts from which notice can reasonably be inferred, that the contractor, engaged in the construction of a sewer requiring

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blasting, had taken into the shed erected in the street, in which were a gasoline engine supplied with fuel and used in drilling rock and a large tank containing a reserve supply of gasoline and placed a few feet from the engine, some sticks of dynamite, taken from the usual place of storage near by, which did not explode, the city is not liable in damages for injury to private property abutting on the street, resulting from an explosion in the shed, in which there was no habitual storage of dynamite. Ib.

OFFICERS.

1. **Damages: Governor's Refusal to Issue Commission.** A court has no authority to entertain or determine a proceeding which has for its object the assessment of damages against the Governor of the State for failing or refusing to issue a commission to an individual elected to an office. *State ex rel. v. Shields*, 342.
2. **Governor's Executive Duties: Political: Controlled by Mandamus or Action for Damages.** The power conferred upon the Governor to issue a commission to one elected to office is not ministerial, but political, and its exercise cannot be compelled by mandamus or otherwise controlled, and in consequence no action against him for damages for failure or refusal to issue the commission can be maintained. Ib.

OFFICERS OF ST. LOUIS. See Assessor.**ORDER OF PUBLICATION.**

1. **Process: In Name of the State.** The provision of the Constitution requiring that "all writs and process shall run in the name of the State of Missouri" is directory and not mandatory in its nature. *Creason v. Yardley*, 279.
2. **____: ____: Constructive Notice.** An order of publication which conveys the same information that it would impart if running in the name of the State is neither void nor voidable, although it is not made to run in the name of the State; and being neither void nor voidable, but a substantial compliance with the law, it cannot upon motion be quashed because it does not so run. [Overruling *obiter dicta* in *Doan v. Boley*, 38 Mo. l. c. 450.] Ib.
3. **Merits of Action: Disregard of Technical Errors.** Where the court has jurisdiction of the subject-matter and by a substantial compliance with the law has obtained jurisdiction of the persons of defendant, it should disregard a failure of the writ or process to technically comply with constitutional provisions or statutes that are purely directory, if such process imparts to defendant the same information as would a technical compliance therewith. Ib.

PARTIES TO ACTION.

1. **Parties Plaintiff: Suit on Bank Bond: Assignee.** An assignee of all the assets, including choses in action, claims and demands, due or to become due the assignor, to be collected by the assignee and applied to the use of the assignor, is authorized to sue on a bond given by an employee of the assignor as a guaranty of efficient service, since such assignment constituted the assignee the trustee of an express trust. *Trust Co. v. Tindle*, 681.
2. **____: ____: ____: Misjoinder of Parties.** Nor did such assignment and statutory authority to sue preclude the assignee from joining the assignor as a party plaintiff in the action on the bond, as one "having an interest in the subject of the action." Ib.

PARTIES TO ACTION—Continued.

3. **Bank: Assignment to Trust Company: Statute.** The statute (Sec. 1084, R. S. 1909) does not prohibit a bank from assigning its assets to a trust company to liquidate its affairs and effect its retirement from business. On the contrary, it encourages such course, as an appropriate agency for carrying out the purpose, in an expeditious and inexpensive way, beneficial to both creditors and stockholders. *Trust Co. v. Tindle*, 681.
4. _____: _____: _____: **Improper Plaintiff: Pleading.** To authorize the sureties on the bond of a cashier to interpose the defense that an assignment by a bank to a trust company for the purpose of liquidation was unlawful because the statute requires the Bank Commissioner to take charge of a bank in a "falling condition" and forbids such a bank to "make a voluntary general assignment," it devolves upon them when sued on the bond to plead it. The point that a petition, alleging that the plaintiff trust company is the assignee of all the assets of the bank, shows on its face that such company is an improper plaintiff, cannot be sustained upon a demurrer thereto. *Ib.*

PARTITION.

1. **Life Estate: Binding on Remaindermen.** A partition of real estate, which appertains only to a life estate, in the absence of fraud, is binding on the remaindermen of the respective life tenants, the remaindermen in that respect being represented by the owners of the preceding estate. *King v. Theis*, 416.
2. _____: **Death of Remainderman: Limitation.** Where testator devised his entire farm to a daughter for life or until her marriage, and, in the event of her marriage, to his two married daughters and a son as tenants in common for life, with remainder in fee in their respective bodily heirs, and said daughter married, and partition suit was brought, to which all the named devisees were parties, the portion allotted to the son, upon his death in 1899 leaving neither wife nor descendants, vested in the surviving daughters, and the action of the children of one of them to recover that portion, brought on March 28, 1914, was barred, by the ten-year Statute of Limitations and Sec. 1883, R. S. 1909, by a foreclosure sale under a deed of trust placed thereon by the son in his lifetime and the continuous possession thereunder by the purchaser, if said daughter's disability of coverture was removed by her husband's death on December 25, 1904, and she died in 1912 without instituting suit. *Ib.*

PATIENT IN STATE HOSPITAL.

1. **Insane Patient: County Charge.** A state hospital makes out a prima-facie case for a claim against the county by showing that the patient had entered the hospital as a county patient and that the charges for a definite subsequent period had not been paid. *State Hospital v. Cole County*, 135.
2. _____: _____: **Inheritance of Estate: Notice to State Hospital: Evidence That Notice Was Received.** Where the county court made an order reciting that a certain person, theretofore confined in a state hospital as a county patient, had become possessed of an estate sufficient to support himself and family, that the probate court had appointed a guardian to take charge of his person and estate, and ordering that such person be no longer a charge upon the county, a transmission of that order to the hospital, in the manner prescribed by Sec. 1429, R. S. 1909, bars the right of the hospital board to recover from the county for the keep of said

PATIENT IN STATE HOSPITAL—Continued.

patient thereafter; and testimony by the deputy county clerk that on the same or the next day after the order was made he made a certified copy of it, inclosed it in an envelope with the county clerk's return address thereon, sealed it, directed it to the superintendent of the hospital, and mailed it, and that he had a specific recollection of mailing the particular document, is positive evidence that the order was received by the hospital, and sufficient to raise a *prima-facie* presumption that the superintendent received the copy so sent, and to submit that issue to the jury. Ib.

3. _____: _____: _____: Instruction: Changing "Deposited With" to "Transmitted To;" Definition. The court did not err in changing the words "deposited with" to "transmitted to" in the instruction asked by the hospital, directing the jury that although they might find from the evidence that the county court made the order transferring the insane patient from a county charge to a pay patient, yet, unless they should further find that a certified copy of the order was "deposited with" the superintendent of the hospital, the verdict should be for it. The statute requires the clerk to "transmit" the certificate to the superintendent, and that duty is discharged when the order is duly mailed in an envelope and addressed to the proper party. That is the meaning of "transmit," while "deposit with" is not synonymous with "filing," but means something more than "to deliver" and something different. Ib.
4. _____: _____: _____: _____: That Notice Was Received. The appellant hospital cannot complain that the jury was not required in terms to find that the order of the county court transferring an insane person theretofore kept at the hospital as a county charge to a pay patient, was actually received by the hospital authorities, where the word "received" was contained in no instruction asked, and the theory of appellant's instruction on which the issue went to the jury was that the proper mailing of the order was a *prima-facie* presumption that it was duly received. Ib.

PLEADING.

1. **Equity: General Relief.** A court once possessed of a cause in equity will not release its hold until full equity has been done to all parties interested therein. Especially is this true where there is, in addition to the prayer for specific relief, a general prayer for relief; for, in such case, the court must consider the full import of the pleadings. *Grownay v. O'Donnell*, 167.
2. _____: _____: Cloud on Title: Partial Relief. Where the question for adjudication is the validity of a deed and the specific prayer is that it be cancelled as a cloud upon the title to the whole tract, the court, under a prayer for general relief, can grant partial relief, and cancel it as to a part of the tract. Ib.
3. **Negligence: Speed Ordinance: Invalidity.** Where defendant pleads and relies upon a certain ordinance as a defense to plaintiff's charge of negligence, the invalidity of said ordinance should be pleaded, and if not pleaded it cannot be excluded as evidence on the ground that it is invalid. *Roper v. Greenspon*, 288.
4. _____: _____: Invalidity Raised at First Opportunity: Waiver. The invalidity of an ordinance, relied upon by defendant as a defense to plaintiff's action for negligence, like the unconstitutional-

PLEADING—Continued.

ity of a statute, should be raised at the first open door in the course of orderly procedure in the case, and if not so raised its invalidity is waived; and the ordinance being pleaded as a defense in the answer, the first opportunity for asserting its invalidity in this case was by an averment in the reply. *Roper v. Greenspon*, 288.

5. _____: _____: **Conflict With State Statute: Waiver.** If the answer pleads that plaintiff was guilty of contributory negligence in running his taxicab in excess of a certain speed ordinance pleaded, and plaintiff replies that the ordinance was in force and that he was not driving in excess of its speed rates, the court is not required to decide that said ordinance conflicts with a state statute on the same subject, neither can said ordinance be excluded from evidence on any such ground. *Ib.*
6. **Demurrer: Exhibits.** In determining whether the petition states a cause of action, exhibits attached to the petition constitute no part of the petition. *Johnston v. Grice*, 423.
7. **Assignee of Express Trust: Improper Plaintiff: Pleading.** To authorize the sureties on the bond of a cashier to interpose the defense that an assignment by a bank to a trust company for the purpose of liquidation was unlawful because the statute requires the Bank Commissioner to take charge of a bank in a "failing condition" and forbids such a bank to "make a voluntary general assignment," it devolves upon them when sued on the bond to plead it. The point that a petition, alleging that the plaintiff trust company is the assignee of all the assets of the bank, shows on its face that such company is an improper plaintiff, cannot be sustained upon a demurrer thereto. *Trust Co. v. Tindle*, 681.

POSSESSION OF STOLEN PROPERTY.

1. **Criminal Intent: Presumption: Corpus Delicti.** The possession by one of the property of another does not raise any presumption, nor is it of itself evidence, that the property was stolen. The possession must be accompanied by other incriminating circumstances, inconsistent with the possessor's innocence. The evidence in this case does not establish beyond a reasonable doubt that the property was stolen or the defendant's guilt. *State v. Lee*, 121.
2. _____: **Instruction: Unexplained Possession.** The purpose of an instruction on the question of the presumption of guilt arising from the recent unexplained possession of stolen property, is to aid in determining the identity of the felonious taker; and where defendant admits that the hog alleged to have been stolen was by his direction taken from the range and placed in his barn by his hired hands, such an instruction should not be given, since the question at issue is not the identity of the taker, but the intent with which the hog was taken. *Ib.*
3. _____: _____: **Assuming Property Was Stolen.** Where the issue is whether or not the hog found in defendant's possession was stolen, an instruction which assumes that the hog was stolen is erroneous. *Ib.*

PRACTICE.

1. **Accident Insurance: Policies of Life Insurance: Materiality: Questions for Jury.** An accident policy, at least those portions of it providing indemnity for loss of life, is a policy of life insurance, within the meaning of the suicide statute (Sec. 6937, R. S. 1909), and that statute provides that no misrepresentation made in ob-

PRACTICE—Continued.

taining a policy of insurance on the life of any person shall be deemed material unless the matter misrepresented actually contributed to the contingency or event on which the policy is to become void, and whether it so contributed in any case shall be a question for the jury. Even though the representation or warranty as to the beneficiary in case of the insured's death is false, the court cannot peremptorily instruct to find for the company, for the jury still have the right to say whether such misrepresentation actually contributed to the loss. *Lamport v. Assurance Corp.*, 19.

2. ———: **Warranties: Insured's Habits of Life: Income: Other Insurance.** Even though the insured warranted that his habits of life were correct, that his income per week exceeded the gross amount of weekly indemnity promised in all accident policies carried by him, and that he had no other accident insurance, if the evidence upon the issue of the falsity of these warranties is conflicting, the matter is for the jury, and the court cannot peremptorily instruct them to find for defendant. *Ib.*
3. **Negligence: Child in Street: Demurrer to Evidence.** When a demurrer to the evidence is considered, plaintiff is entitled to have it viewed in its most favorable light; and where there is evidence tending to show that a child less than three years of age, unattended, stepped from the curb into the street as the street car slowly approached; that as the front of the car passed him he was standing five feet from the track, to which position he had approached from the curb while the car had traveled twenty feet; that the motorman saw him and watched him only until the front trucks had passed beyond the position of the child, and then ceased watching him and started to increase the speed, a demurrer to the plaintiff's case of damages for negligence should not be given; for evidently after the front trucks passed, the child moved a step or two closer to the car and placed his hands against the side thereof (as some of the evidence tended to show) and was thrown off his feet and fell in such a way that his feet became entangled under the rear wheels, which ran over them. The motorman's duty of exercising ordinary care for the child's safety was not fully performed by watching the child only until danger from the front trucks was passed. *Turnbow v. Dunham*, 53.
4. **Certiorari to Court of Appeals: Conflict of Opinions: Different Conclusions from Similar Facts.** Where the facts in a case before the Court of Appeals are so similar to the facts in a case previously decided by the Supreme Court as to require that the same rule of law should be applied to the facts of both cases, the Supreme Court will on *certiorari* quash the judgment of the Court of Appeals if the two opinions conflict. *State ex rel. v. Farrington*, 157.
5. ———: ———: ———: **Action on Insurance Policy: Fraudulent Representations: Question for Jury.** The Supreme Court has not ruled that the fraudulent intent of the insured in making misrepresentations as to the value of the goods insured or the extent of the injury must always be submitted to the jury. The rule is that where the evidence is such that the jury may reach a conclusion one way or the other on the question of fraudulent intent, the case must go to the jury; but where the evidence conclusively shows a fraudulent intent in making the misrepresentations a demurrer to the evidence should be sustained. And whether the Court of Appeals was right or wrong in holding that the insured's evidence conclusively showed fraudulent misrepresentations as to material facts by him, their ruling in that re-

PRACTICE—Continued.

spect was not in conflict with any prior ruling of the Supreme Court, and for that reason cannot be quashed by *certiorari*. *State ex rel. v. Farrington*, 157.

6. **Principal and Agent: Negligence of Automobile Driver: Liability of Owner: Presumption.** In a suit for damages against the owner of an automobile, for personal injuries due to the negligent driving of the car by the chauffeur, in the absence of the owner, proof that the automobile was owned by the defendant and that the chauffeur was in his general employment raises a presumption that the chauffeur at the time was acting within the scope of his employment and makes a *prima-facie* case against the owner resting on the presumption. But such presumption takes flight upon the appearance of evidence of real facts to the contrary.

Held, by WOODSON, J., dissenting, that the court cannot hold as a matter of law that the *prima-facie* case was completely overcome and destroyed by the evidence introduced by defendant, but whether or not it was so destroyed is a question for the jury, whose province it is to determine its credibility and weigh its probative force. *Guthrie v. Holmes*, 215.

7. **Will Contest: Action at Law.** A will contest is a statutory legal action triable by a jury, whose verdict, if supported by substantial evidence on the issues properly submitted, is conclusive on appeal, absent error in the trial and in the giving and refusing of instructions. *Hahn v. Hammerstein*, 248.

8. **Independent Causes: Explosion of Dynamite: Substantial Evidence: Question for Jury.** The rule that when the evidence discloses two independent causes of the injury, for one of which defendant is liable and for the other of which he is not, it is incumbent upon the plaintiff to show that the cause for which defendant is liable produced the injury, imposes upon the plaintiff the duty of offering substantial evidence tending to show that the cause for which defendant is liable produced the injury; and that having been done, the jury, under proper instructions, passes upon the question of fact thus involved, just as upon any other such question, and the quantum of evidence necessary to sustain a finding thereon differs not at all from that required on other issues of fact. The appellate court cannot weight conflicting evidence upon such an issue. *Holman v. Clark*, 266.

9. **Merits of Action: Disregard of Technical Errors.** Where the court has jurisdiction of the subject-matter and by a substantial compliance with the law has obtained jurisdiction of the persons of defendant, it should disregard a failure of the writ or process to technically comply with constitutional provisions or statutes that are purely directory, if such process imparts to defendant the same information as would a technical compliance therewith. *Creason v. Yardley*, 279.

10. **Contributory Negligence: Question for the Jury.** Where there is conflicting evidence on every vital question touching the negligence of plaintiff, the question of his contributory negligence is an issue for determination by the jury; and notwithstanding the evidence on that question preponderates in favor of defendants, the appellate court cannot declare as a matter of law that plaintiff was guilty of such contributory negligence as bars a recovery, even though all the testimony except his own, which is positively to the contrary, shows recklessness on his part at the time of the accident. *Roper v. Greenspon*, 288.

PRACTICE—Continued.

11. **Quieting Title: Suit in Equity: Cancellation of Deed: Cloud on Title.** An answer asking the court to cancel the deed upon which plaintiff relies to establish his title, as a cloud upon the defendant's title, and a judgment which actually grants this equitable relief, convert the action to quiet title into a suit in equity, and authorize the appellate court to weigh the conflicting evidence.

Held, by FARIS, J., dissenting, with whom BOND, J., concurs, that, in order to entitle defendant to equitable relief and convert the action into a suit in equity, some defense bottomed on well-known equitable grounds must be pleaded, and that a prayer to cancel a deed in plaintiff's chain of title, which in its final analysis amounts only to a contention that defendant's title is better than plaintiff's, does not plead any equitable ground; and the action being one at law, the appellate court cannot settle a conflict on the substantial evidence, but must accept the finding of the trial court sitting as a jury. Lewis v. Barnes, 377.

12. **Questions for Jury: Accessory: Of Father to Rape of Daughter: Substantial Evidence.** If upon a careful examination of the acts, behavior and language of the father, charged with being an accessory to an assault upon his daughter less than fifteen years of age with intent to rape, it appears to the court that his language may well have been construed to have no other meaning than that the child was to be sent up to the railway boarding car for the purpose and upon a bargain that the cook and his assistant, one or both, might have sexual intercourse with her, and she was sent and the assault made or attempted, the question of the father's guilt becomes an issue for the jury to determine, for these facts constitute substantial evidence. State v. Gulley, 484.
13. ———: **Substantial Evidence.** If the acts of defendant were obviously susceptible of the construction that defendant is guilty of the crime charged they constitute substantial evidence of his guilt, and the question of his guilt then becomes one of fact for the jury to decide, and not one of law for the appellate court to determine. Ib.

PRESUMPTION.

Criminal Intent: Possession of Property: Corpus Delicti. The possession by one of the property of another does not raise any presumption, nor is it of itself evidence, that the property was stolen. The possession must be accompanied by other incriminating circumstances, inconsistent with the possessor's innocence. The evidence in this case does not establish beyond a reasonable doubt that the property was stolen or the defendant's guilt. State v. Lee, 121.

PRINCIPAL AND AGENT.

1. **Negligence of Automobile Driver: Liability of Owner: Presumption.** In a suit for damages against the owner of an automobile, for personal injuries due to the negligent driving of the car by the chauffeur, in the absence of the owner, proof that the automobile was owned by the defendant and that the chauffeur was in his general employment raises a presumption that the chauffeur at the time was acting within the scope of his employment and makes a *prima facie* case against the owner resting on the presumption. But such presumption takes flight upon the appearance of evidence of real facts to the contrary.

PRINCIPAL AND AGENT—Continued.

Held, by WOODSON, J., dissenting that the court cannot hold as a matter of law that the *prima facie* case was completely overcome and destroyed by the evidence introduced by defendant, but whether or not it was so destroyed is a question for the jury, whose province it is to determine its credibility and weigh its probative force. *Guthrie v. Holmes*, 215.

2. _____: _____: Failure to Observe Master's Direction. Where the chauffeur was directed to take the automobile to the master's garage, which he could have done in an hour, and instead of doing so spent five hours or more driving over the city before (in a drunken state) he negligently ran the car against plaintiff, there is no presumption that at the time of the accident he was acting within the scope of his employment; but in order to hold his master liable for the damage, positive proof that he was in fact at the time of the accident engaged in the performance of duties for the master was required. Ib.
3. _____: _____: Having Car Repaired. The fact that after the master directed the chauffeur to take the automobile to the garage, the chauffeur, who was an experienced mechanic, discovered a "knock" in the engine and, instead of remedying the defect himself, which he could easily have done, went to the general garage of cars of like manufacture, and there saw and took into his car the man in charge, does not establish that such trip was within his duties, even though he had been previously instructed to go to a machine shop and have some parts made. Especially is this true, where the facts show that the chauffeur for the next two hours, after making said trip and before the accident occurred, was engaged in a joy-ride and a drunken debauch. Ib.
4. _____: _____: Slight Deviations from Directions. Slight deviations from the master's directions to his chauffeur, or incidental things done by him for his own benefit while in the line of his service for the master, will not destroy the presumption that the regularly employed chauffeur, at the time he negligently ran his automobile against a pedestrian, was acting within the scope of his employment. But the acts of the chauffeur in this case were not slight deviations, nor mere incidents of his employment, but destroyed the presumption. Ib.

PROBATE COURT.

1. Jurisdiction: Of Circuit Courts: Accounting: Trust Fund: Suit Against Executors. A petition, filed by plaintiff in his individual capacity, having for its object an accounting in respect to a trust, under which he held certain property, both real and personal, conveyed to him by a testator under separate contract, to be held, managed and disposed of by plaintiff for the purpose of reimbursing himself for money advanced and services performed by him for the benefit of said testator, and naming the executors of a residuary legatee named in said testator's will as defendants, states a cause of action for equitable cognizance in the circuit court, and the jurisdiction to take the accounting does not reside in the probate court. *Johnston v. Grice*, 423.
2. _____: _____: Converse of Proposition. The probate court has no jurisdiction to entertain a petition filed by executors under a will, asking for a decree declaring that an absolute conveyance made by testator be adjudged an equitable mortgage, and that the grantee be required to account for his stewardship as trustee thereunder; and the converse of said proposition, were the situation of the parties reversed, must be true. Ib.

PROBATE COURT—Continued.

3. ———: **Equitable Matters: Accounting.** The probate court is not a court of general equitable jurisdiction, although it may, like other courts of law, consider and determine questions of an equitable nature incident to the exercise of its statutory jurisdiction. It may settle the accounts of executors and administrators made by them in the performance of their duties as such, but not their accounts involved in transactions in other capacities, whether as trustees or as individuals. *Ib.*
4. ———: **Death of Beneficiary of Trust: Trustee Named as Executor.** Plaintiff was a surety on the bond of a guardian, and upon his default paid a large sum of money for him, and by way of reimbursement the guardian conveyed to him certain real estate, whereupon he promised the guardian that he would return to him whatever he could save above the debt he had been required to pay and the cost of maintenance and compensation for his service. For six years he administered the trust, after which the guardian died leaving a will in which plaintiff was appointed executor and two other persons were designated as residuary legatees. One of these persons assigned his interest to the other, and died leaving a will in which he named a third person as legatee and appointing two of the defendants as executors. The trustee sues in his individual capacity for an accounting of the trust estate, naming the surviving legatee under the guardian's will and the executors under the other legatee's will as defendants. *Held,* that the death of the guardian had no effect upon the plaintiff's rights or duties under the terms of the trust, although he himself was the beneficiary holding and managing the property for the purpose of paying a debt due him from the guardian, and he was subsequently named by the guardian as executor of his will, and two of the defendants are executors of the will of one of the residuary legatees named in the guardian's will. The probate court has no jurisdiction to settle the account pertaining to the trust estate, but it is one of equitable cognizance in the circuit court, since the account pertains to the execution of the trust, and not to the execution of the guardian's will or the will of said residuary legatee, neither of whom had power by will to change the terms of the trust. *Ib.*

PROCESS.

1. **In Name of the State.** The provision of the Constitution requiring that "all writs and process shall run in the name of the State of Missouri" is directory and not mandatory in its nature. *Creason v. Yardley*, 279.
2. ———: **Order of Publication.** An order of publication which conveys the same information that it would impart if running in the name of the State is neither void nor voidable, although it is not made to run in the name of the State; and being neither void nor voidable, but a substantial compliance with the law, it cannot upon motion be quashed because it does not so run. [Overruling *obiter dicta* in *Doan v. Boley*, 38 Mo. 1. c. 450.] *Ib.*
3. **Merits of Action: Disregard of Technical Errors.** Where the court has jurisdiction of the subject-matter and by a substantial compliance with the law has obtained jurisdiction of the persons of defendant, it should disregard a failure of the writ or process to technically comply with constitutional provisions or statutes that are purely directory, if such process imparts to defendant the same information as would a technical compliance therewith. *Ib.*

PROPERTY.

Power to Arbitrarily Dispose of. The owner of property has unlimited power to alienate it by deed or will, if the act is understandingly done and is free from coercion, fraud or lack of mental incapacity and undue influence; and this power of arbitrary disposition of a capable and uninfluenced person pertains to absolute ownership, and may be reflected in deeds or wills exhibiting the loves, hates, partialities or caprices of the grantor or testator, which of themselves are not sufficient reasons for annulling the instruments. *Bennett v. Ward*, 671.

PUBLIC SERVICE COMMISSION.

1. **Public Utility: Service for Members Alone.** A voluntary association of farmers, which constructs telephone lines and owns the 'phones, not operated for hire, but for the personal convenience of the members, with no other expenses than the necessary cost of connecting the lines at the switchboard, in a town in which they center, with the lines of other like associations, is not a public utility; and since its use and operation do not affect the interests of the general public, the Public Service Commission has no power under the statute to compel the making of a physical connection between its lines and those of a public telephone corporation. The regulative authority of the Commission is confined to such companies as "conduct telephonic communications for hire." *State ex rel. Tel. Co. v. Pub. Serv. Com.*, 627.
2. **_____: Service to Non-Subscribers.** Nor did the fact that the association charged a flat rate to a few non-members, who constructed their own lines and maintained their own 'phones, and thereupon were entitled to connect with the lines of members and to use the facilities of the association without further charge, convert the association, the use of the lines of which was otherwise confined to members alone, into a public utility; for its constitution and by-laws conferred upon it no such authority as it thus exercised. *Ib.*
3. **_____: Power of Supervision: Public Rights.** To authorize supervision by the Public Service Commission, the exercise by the utility of its powers must be such as will affect public interest rather than private rights.
4. **Extent of Review: Questions Not Raised Before Commission.** A constitutional question injected into a case for the first time on review in the circuit court, namely, that the order of the Public Service Commission requiring the defendant to connect its telephone lines with the lines of a voluntary association, not a public utility, is a taking of property without just compensation and without due process of law, cannot be considered by the court, because not timely raised. *Ib.*
5. **Private Telephone Association: Connection With Public Utility: Public Necessity.** Numbers will not establish a claim of public necessity. That a large number of persons are being served by telephone lines, constructed for their own convenience and confined to their private use, does not entitle them, individually or collectively, on the ground of public necessity, to an order from the Public Service Commission compelling a public utility in their midst to make a physical connection between their line and its own. *Ib.*
6. **Alteration of Grade Crossings: Delegation of Legislative Power.** It was entirely competent for the Legislature to delegate to the Pub-

PUBLIC SERVICE COMMISSION—Continued.

lic Service Commission composed of trained experts exclusive power to require the installation, alteration or removal of the crossings of highways by railroads and street railways, and a separation of grades at such crossings, and to prescribe the terms upon which such separations are to be made and the proportions in which the expense shall be divided among the railroad and street railway corporations affected, or between them and the State, county, or municipality or other public authority in interest, as it has done. State ex rel. Ry. Co. v. Publ. Serv. Com., 645.

7. ———: **Modifications of Common Law.** The statute giving to the Public Service Commission "exclusive power" to charge the costs and expenses of the elimination of a street grade-crossing and the restoration of the highway against the street railway or steam railroads affected, or to apportion them among other parties interested, and making it its duty to apportion such costs among such corporations and "the State, county, municipality or other public authority," is but a modification by positive law of the common law, by expanding the principles of the common law so as to fit the conditions arising in social and industrial evolution and to apply them to a fuller and more enlightened justice than was afforded under the narrower enunciations of that law at a time when there were fewer diversities of interest to be affected by the removal of railroad street crossings. Ib.
8. ———: **Reasonable Apportionment of Costs: According to Trackage.** Where the Public Service Commission found the total cost of the removal of dangerous street-level crossings, and the restoration of the highways, and subtracted therefrom the estimated consequential damages to private property and apportioned that deduction to the city, and of the balance of \$238,000 apportioned \$203,431 to the steam railroads and \$34,569 to the street railway, using the "trackage basis" plan in making the allotment, principally but not solely, but taking into consideration certain other elements of constructive cost and benefit of the general improvement, and its finding is sustained by the clear preponderance of the relevant testimony as to the proper method of making the apportionments, they will not be held to be unreasonable or unjust, although the street railway company contended throughout that it should be required to pay only the estimated cost of the work to be done within its track zone, which would be materially less than its allotment. Ib.
9. **Reasonableness of Order: Determined Upon Equitable Principles.** The reasonableness and justice of an order of the Public Service Commission will be determined by the court upon a review of all the evidence as in a trial of a suit in equity.
Held, by BLAIR, J., dissenting, with whom WILLIAMS, J., concurs, that, for the reasons stated in State ex rel. Wabash R. Co. v. Publ. Serv. Com., 271 Mo. 155, the court in cases like this does not weigh the evidence as in suits in equity. Ib.

PUBLIC UTILITY. See Public Service Commission.

QUIETING TITLE.

- 1. **Suit in Equity: Cancellation of Deed: Cloud on Title.** An answer asking the court to cancel the deed upon which plaintiff relies to establish his title, as a cloud upon the defendant's title, and a judgment which actually grants this equitable relief, convert the action to quiet title into a suit in equity, and authorize the appellate court to weigh the conflicting evidence.

QUIETING TITLE—Continued.

Held, by FARIS, J., dissenting, with whom BOND, J., concurs, that, in order to entitle defendant to equitable relief and convert the action into a suit in equity, some defense bottomed on well-known equitable grounds must be pleaded, and that a prayer to cancel a deed in plaintiff's chain of title, which in its final analysis amounts only to a contention that defendant's title is better than plaintiff's, does not plead any equitable ground; and the action being one at law, the appellate court cannot settle a conflict on the substantial evidence, but must accept the finding of the trial court sitting as a jury. Lewis v. Barnes, 377.

2. **Laches: Enhancing Value by Building Railroad.** The true owner cannot be charged with laches for delay in asserting title for that defendant, in his work in promoting and building railroads, had brought these commercial conveniences so close to the land as to greatly increase its value. Ib.

RAILROADS.

1. **Negligence: Pedestrian on Track: Evidence of Signals at Crossing.** Where defendant's unfenced spur track ran through a thickly settled community, and the use of the track by pedestrians had been acquiesced in for years by defendant, and its trains were run over the track not for public convenience but at irregular intervals in hauling coal, evidence that no bell was rung or whistle sounded just before or at the time of backing the loaded cars over the track on which deceased was walking when struck, is competent, and is not to be excluded on the theory that the statutory duty to give such signals at a road crossing does not pertain to a pedestrian on a track 150 feet from a public crossing. Beard v. Railroad, 142.
2. _____: _____: _____: **Instruction: Anticipating Pedestrian on Track.** It being the duty of the railroad company to ring the bell or sound the whistle when it approached that portion of its track used for travel by pedestrians, it was error to instruct the jury that their verdict must be for defendant unless the trainmen saw or by the exercise of ordinary care could have seen the deceased in a position of peril and thereafter failed to stop the train in time to avoid striking him, especially when the facts point to the conclusion that the failure to give either of the signals tended to cause the injury. That neither of the trainmen saw the deceased did not lessen the duty to give one or the other signal. Ib.
3. _____: **Instruction: Based on Conjecture: Climbing on Car.** The giving of an instruction which attempts by inference based on conjecture to define the limit of defendant's liability is error. To tell the jury that their verdict must be for defendant if the deceased fell or was thrown under a moving train in an attempt to climb on the cars, where there is no testimony from which the conclusion can reasonably be drawn that he made such an attempt, is error. Ib.
4. _____: _____: **Result of Mere Accident.** Where the injury was caused either by the negligence of defendant or that and the contributory negligence of deceased, an instruction that if the injury was the result of a mere accident plaintiff cannot recover, should not be given. Ib.
5. _____: _____: **Trespasser.** The deceased was not a trespasser when struck by defendant's train while walking on a portion of its track which ran through a thickly settled community and

RAILROADS—Continued.

was much used as a pathway by pedestrians with defendant's acquiescence; and an instruction limiting defendant's liability on the assumption of trespass was erroneous. Ib.

6. _____: **Ordinary Care: Lookout on Rear of Backing Train.** In backing a long train of cars over a portion of its track on which pedestrians had a right to be and frequently traveled, ordinary care requires that a railroad company place some one on the last car to lookout for such persons. Ib.
7. **Negligence in Construction of Track: Curve Near Coal Bin.** A spur track passed along the north side of a poultry house in a westerly direction, thence across the street on a thirty-degree curve to the south which ended in a tangent a few feet west of the street, and extended from that point a distance of fifty-two feet along the north side of a coal bin of an electric light plant, in an almost straight line and at a practically uniform distance of four feet from the bin. The effect of the curved track was that a car forty-two feet long standing at the coal bin in a position to be unloaded stood at a distance sufficient to permit a switchman to stand or move between the car and the bin with safety, but when the car moved eastward, at his signal, its middle portion, owing to the curve in the track, swung in towards the inside of the curve and slowly moved nearer to the coal bin, and crushed him between the car and bin. *Held*, that under the circumstances the construction of the curved track so as to permit the switchman to be injured in the manner he was injured was not a neglect of the master's duty to provide a reasonably safe place in which the servant might perform his appointed work, there being no showing that the company did not do its best, consistently with successful operation, in the location and construction of the track on the line adopted. *Morris v. Pryor*, 350.
8. _____: _____: **Reasonably Safe: Absolute Safety.** The term "reasonably safe" does not mean that a railroad company is required to construct its track, in its relation to the physical features of the electric light plant it is required to serve, in such a manner that the operation of trains thereon will be absolutely safe, even to careful employees. Ib.
9. _____: _____: **Assumption of Risks.** Railroad trainmen are surrounded with dangers to life and limb under the most favorable circumstances, the risk of which they assume in their employment. Ib.
10. _____: _____: _____: **Primary Duty of Railroad: Latitude of Judgment in Performance.** The primary duty of a railroad is to render that service to the public which the law imposes as an incident to the calling and the exercise of its franchise. In the matter of supplying appliances to meet that duty under diverse conditions it must be allowed a latitude of judgment, since variable conditions are important stones in the foundation of the doctrine of assumption of risk; and if its officers and servants undertake the work of performing that duty, under circumstances charging them with full knowledge of all the dangers and difficulties incident to its successful prosecution with the facilities available, without complaint or other expression of dissatisfaction, they assume the risk of injuries resulting from the use of such facilities, even though they would not have occurred in the use of some other instruments or situation designed to accomplish the same purpose. Ib.

RAILROADS—Continued.

11. _____: _____: **Experienced Employee: Heedlessly Choosing Dangerous Situation.** The railroad company cannot be charged with negligence in constructing a curved spur track leading to a coal bin of an electric light plant, if the injured switchman, foreman of the crew, experienced in the performance of his work, knowing the tendency of the middle portion of a car to swing in towards the inside of the curve, heedlessly took his position between the car and the bin, when the other side was safe and customarily used, and gave the signal to move, and heedlessly turned his back to the car when it began to move, and was crushed when the car swung in towards the bin, when if he had exercised prudence for his safety a few steps would have enabled him to avoid the accident. *Morris v. Pryor*, 350.
12. **Public Service Commission: Alteration of Grade Crossings: Delegation of Legislative Power.** It was entirely competent for the Legislature to delegate to the Public Service Commission composed of trained experts exclusive power to require the installation, alteration or removal of the crossings of highways by railroads and street railways, and a separation of grades at such crossings, and to prescribe the terms upon which such separations are to be made and the proportions in which the expense shall be divided among the railroad and street railway corporations affected, or between them and the State, county or municipality or other public authority in interest, as it has done. *State ex rel. Ry. Co. v. Pub. Serv. Com.*, 645.
13. _____: _____: **Modifications of Common Law.** The statute giving to the Public Service Commission "exclusive power" to charge the costs and expenses of the elimination of a street grade-crossing and the restoration of the highway against the street railway or steam railroads affected, or to apportion them among other parties interested, and making it its duty to apportion such costs among such corporations and "the State, county, municipality or other public authority," is but a modification by positive law of the common law, by expanding the principles of the common law so as to fit the conditions arising in social and industrial evolution and to apply them to a fuller and more enlightened justice than was afforded under the narrower enunciations of that law at a time when there were fewer diversities of interest to be affected by the removal of railroad street crossings. *Ib.*
14. _____: _____: **Reasonable Apportionment of Costs: According to Trackage.** Where the Public Service Commission found the total cost of the removal of dangerous street-level crossings and the restoration of the highways, and subtracted therefrom the estimated consequential damages to private property and apportioned that deduction to the city, and of the balance of \$238,000 apportioned \$203,431 to the steam railroads and \$34,459 to the street railway, using the "trackage basis" plan in making the allotment, principally but not solely, but taking into consideration certain other elements of constructive cost and benefit of the general improvement, and its finding is sustained by the clear preponderance of the relevant testimony as to the proper method of making the apportionments, they will not be held to be unreasonable or unjust, although the street railway company contended throughout that it should be required to pay only the estimated cost of the work to be done within its track zone, which would be materially less than its allotment. *Ib.*
15. _____: **Reasonableness of Order: Determined Upon Equitable Principles.** The reasonableness and justice of an order of the Public

RAILROADS—Continued.

Service Commission will be determined by the court upon a review of all the evidence as in a trial of a suit in equity.

Held, by BLAIR, J., dissenting, with whom WILLIAMS, J., concurs, that for the reasons stated in *State ex rel. Wabash R. Co. v. Publ. Serv. Com.*, 271 Mo. 155, the court in cases like this does not weigh the evidence as in suits in equity. *Ib.*

RAPE, STATUTORY. See *Carnal Knowledge*.**REFORMING MORTGAGE.** See *Lands and Land Titles*, 4.**REGULATION OF RURAL TELEPHONES.** See *Public Service Commission*.**REMAINDERMEN.** See *Conveyances*.**RES ADJUDICATA.**

Record of Former Trial: Writ of Error. Where the Court of Appeals had affirmed the judgment of the trial court rendering judgment for damages against plaintiffs on their bond in a dissolved injunction and had remanded the cause to the circuit court with directions to enter judgment for a designated sum as of a certain date, and the circuit court had complied with that mandate, the interested parties being present, plaintiffs cannot, by a writ of error sued out of the Supreme Court to review this last judgment, inject into the case, to aid the writ, the record of the trial which resulted in the judgment from which the appeal was taken to the Court of Appeals, for the issues raised in that trial had become *res adjudicata*, and form no part of the record and proceedings brought up by the writ of error, and hence cannot be reviewed by the Supreme Court. *Barrett v. Stoddard County*, 129.

RESIDENCE.

1. **Intention: How Shown.** Residence is largely a matter of intention, and intention is to be deduced from acts and utterances of the person whose residence is in issue. *In re Lankford Estate*, 1.
2. **_____: As Manifested by Will: Abandonment.** A statement in decedent's will, made in this State shortly before his death in this State, that his residence was at "Marshall, Saline County, Missouri," is a solemn written admission that his residence was at such place; and a further statement that his residence had formerly been at "Pueblo, county of Pueblo and State of Colorado," together with the admission, plainly indicate both an abandonment of a former residence and the acquisition of a new one; and the two make out a *prima-facie* case of residence in this State for the purposes of an assessment of a collateral inheritance tax. *Ib.*
3. **_____: _____: Disqualification to Vote.** The fact that, after an absence of thirty years in other states, decedent stated in November that he was not qualified to vote in this State, after his return to the residence of his niece in April, where his will was made and where he died in December, is no contradiction of the solemn admission in his will that he was a resident of this State, for he was not qualified to vote in this State until he had resided here one year. *Ib.*
4. **_____: _____: No Payment of Taxes.** Nor does the fact that, after an absence of thirty years, he paid no personal taxes in this State, contradict the *prima-facie* case made by the will, since his death, after he returned to this State, occurred before he became liable for taxes here. Nor does the fact that he was not assessed for taxes here. *Ib.*

ROADS AND HIGHWAYS.

1. **Repealed Statute: Continued Operation Thereunder.** Sections 8060 and 8062, Revised Statutes 1909, were intended to continue in force repealed statutes until proceedings commenced thereunder may be completed. Sections 10520 to 10525, Revised Statutes 1909, under which bonds were issued by a county to build public roads, though repealed by the Act of 1917, without a saving clause, were so far kept in force by Sections 8060 and 8062 as to authorize the county court, under Section 1249, to refund the bonds by the issuance of new bonds of the denominations and bearing the rate of interest authorized by said act. *State ex rel. v. Hackman*, 600.
2. _____: _____: **Continued in New Enactment.** Where the purpose and operative force of an existing statute and the one repealing it are the same, differing only in minor particulars, the repealing act is to be construed as a continuation of the one repealed, and proceedings in compliance with the latter prior to its repeal and continued thereafter in conformity with the former are regular and in accordance with legislative direction. *Ib.*

ST. LOUIS CHARTER. See **Assessor.**

SALARY OF JUSTICE OF PEACE. See **Counties, 3.**

STATE OFFICER. See **Assessor.**

STATUTES CITED AND CONSTRUED.**Revised Statutes 1909.**

| | | |
|---------|--|---------------------------|
| Section | 309, see pages 10, 469. | 1794, see page 592. |
| | 332, see page 471. | 1813, see page 593. |
| | 340, see page 257. | 1818, see page 593. |
| | 341, see page 256. | 1883, see page 423. |
| | 351, see page 107. | 1884, see pages 386, 395, |
| | 535, see page 258. | 405. |
| | 536, see pages 258, 328. | 2025, see page 42. |
| | 537, see page 258. | 2038, see page 107. |
| | 555, see page 257. | 2082, see pages 287, 412. |
| | 583, see page 422. | 2083, see page 11. |
| | 717, see pages 520, 521. | 2119, see page 287. |
| | 896, see page 694. | 2254, see page 50. |
| | 1080, see page 445. | 2381, see page 164. |
| | 1081, see page 694. | 2535, see page 103. |
| | 1084, see pages 693, 694. | 2547, see page 371. |
| | 1094, see pages 446, 447. | 2548, see page 371. |
| | 1098, see page 446. | 2549, see page 371. |
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| | 1249, see pages 605, 606, 610, 612. | 2878, see page 422. |
| | 1249 to 1251, see page 611. | 3140, see page 153. |
| | 1275, see page 606. | 3729, see pages 443, 451. |
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| | 1671, see page 471. | 3803, see pages 450. |
| | 1730, see page 693. | 3805, see pages 450. |
| | 1731, see page 693. | 3938, see page 166. |
| | | 4031, see page 79. |
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- Section 4750, see pages 524, 525.
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 11402, see page 568.
 11432, see page 556.
 ch. 41, art. 4, see page 309.
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 ch. 84, art. 9, see page 199.
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Revised Statutes 1899.

- Section 4268, see pages 397, 406. Section 9137, see page 548.
 7057, see page 660. ch. 12, arts. 8, 12, 13 and
 20, see page 445.

Revised Statutes 1889.

- Section 2092, see page 421. Section 7524, see page 548.
 5279, see page 341.

Revised Statutes 1879.

- Section 6678, see pages 548, 559.

1 Wagner's Statutes 1872.

- p. 698, see pages 403, 410, 411, 412, 413, 414, 415.

General Statutes 1865.

- p. 449 see page 386.
 p. 450, see pages 392, 393.
 p. 650, sec. 77, see page 50.

Revised Statutes 1855.

- ch. 56, sec. 5, see page 107.
 p. 1265, sec. 19, see page 286.
 p. 1326, see page 564.

STATUTES CITED AND CONSTRUED—Continued.**Revised Statutes 1835.**

p. 153, sec. 7, see page 50.

Laws 1917.

p. 442, see page 605.

p. 470, secs. 83, 84 and 85, see pages 605, 609.

Laws 1915.

p. 324, see page 207.

Laws 1913.

pp. 271-281, see page 309.

p. 272, see pages 312, 315, 316, 319.

p. 273, see pages 316, 319.

p. 334, see page 557.

p. 556, see page 650.

pp. 556-551, see pages 636, 642.

p. 589, sec. 50, see page 650.

p. 641, sec. 110, see page 643.

Laws 1911.

p. 322, see pages 298, 299, 300.

Laws 1907.

p. 124, see page 445.

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p. 121, see page 79.

p. 272, see page 561.

p. 320, see pages 547, 556, 560.

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p. 263, see page 547.

Laws 1899.

p. 324, see pages 559, 560.

Laws 1895.

p. 41, see page 559.

Laws 1872-3.

p. 236, see page 201.

Laws 1871-2.

p. 88, see pages 547, 558.

Laws 1871.

p. 49, sec. 34, see page 11.

Laws 1870.

p. 111, see page 391.

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p. 178, see page 564.

Laws 1852-3.

pp. 251-2, see pages 196, 197, 199, 200, 201.

Laws 1844-5.

p. 141, see page 196.

Laws 1825.

p. 522, see page 370.

STATUTES AND STATUTORY CONSTRUCTION.

1. **Taxation: Agricultural Lands by City: Exemption: Repeal by Legislature.** In the absence of a constitutional inhibition to the contrary (and there was none in the Constitution of 1820), the Legislature was vested with inherent power to repeal a provision in a charter granted by special act of the Legislature in 1853 forbidding the city to levy and collect taxes on lands included within an extension of its corporate boundaries unless and until said lands were laid off into lots. Said act did not create a contractual obligation on the part of the General Assembly to exempt said lands from city taxes, nor an express or implied agreement to refrain from repealing said exemption or amending said act. *State ex rel. v. Hemenway*, 187.
2. **_____: _____: _____: Subject to Subsequent Laws.** Lands exempt from city taxation by a special charter granted in 1853 became subject to taxation for city purposes after said city became a city of the fourth class, under the general law of taxation relating to cities of such class, there being nothing in the then Constitution or in the act itself which inhibited the General Assembly from making such property subject to city taxes. *Ib.*
3. **_____: _____: No Exemption by Subsequent Act.** Section 11335, Revised Statutes 1909, does not exempt agricultural or pastoral lands included within the corporate limits of a city which was incorporated by special act of the Legislature in 1845, amended in 1853 so as to include such lands and providing that they were not to be taxed until laid off into lots; and the General Assembly had power, under the Constitution of 1875, to enact said Section 11335, omitting such exemption therefrom. *Ib.*
4. **_____: _____: No Longer Considered Within Corporate Limits.** The fact that agricultural land was brought within the city limits by legislative enactment in 1853, and that the exemption of it from city taxation was one of the inducements for bringing it in, and that subsequently the Constitution and statutes repealed that exemption, valid when made in 1853, do not constitute a sufficient reason for considering the property as no longer within the city's corporate limits. *Ib.*
5. **County Court Drainage Act: Amendment of 1913: Discretion as to Necessity for Improvement.** Section 5583 of the County Court Drainage District Act of 1913, Laws 1913, p. 272, if considered alone, without reference to the context, or to the succeeding sections of the act, requires the county court to make an order incorporating a drainage district in cases where the owners of a

STATUTES AND STATUTORY CONSTRUCTION—Continued.

majority of the acres in the proposed district petition therefor. But such a construction would render the next section (Sec. 5584, Laws 1913, p. 273) meaningless and futile, and Section 5583 itself unconstitutional and void. The two sections must be read together, and when that is done they authorize the county court, even when a petition for incorporation signed by the owners of a majority of the acres in the proposed district is presented, to determine whether or not the improvement is "necessary for sanitary or agricultural purposes, or would be of public utility or conducive to the public health, convenience or welfare," and a determination by the court, after the filing of a remonstrance and an orderly public hearing, that the proposed improvement is not necessary for any of these purposes, cannot be nullified by mandamus. *State ex rel. v. West*, 304.

6. **Mandamus: Damages: False Return.** Within the purview of the common law, and of the present statute (Sec. 2547, et seq., R. S. 1909), no recoverable damages accrue to the relator for that he was compelled to bring mandamus, unless the respondent by making a false return, and thereby raising a false issue of fact, as contradistinguished from pure issues of law, puts the relator to vexation and expense in disproving such false issue of fact. The only difference between the common law and statutes in this respect is that at common law damages were assessed in a separate action, but under the statute they may be assessed in the mandamus proceeding or by independent action; but neither at common law could relator, nor under the statute can be, recover damages unless there was or is a false return. *Smith v. Berryman*, 365.
7. **County Depository: Proviso to Statute: Power to Reject All Bids.** The purpose of the statute authorizing the county court to contract with a banking institution for the deposit of county funds (Sec. 3805, R. S. 1909) is to obtain for the public the largest available income from those funds, consistent with their safety and ample security; and the purpose of the proviso, giving to the court the "right to reject any and all bids," was not to give to the court the power to do whatever it might desire to do, but to save from defeat the legislative purpose by preventing combinations of bidders and a division of the funds among themselves in accordance with private agreements, and for use in many other ways in safeguarding the funds; it cannot be used to thwart the legislative purpose and the exercise of good faith which the statute imposes. *Denny v. Jefferson County*, 436.
8. **Inheritance Tax: Children of Adopted Child.** The words "legally adopted children" found in Sec. 309, R. S. 1909, providing that "all property which shall pass by will, or by the intestate laws of this State, other than to or for the use of the father, mother, husband, wife, legally adopted children, or direct lineal descendants of the testator, shall be and is subject to the payment of a collateral inheritance tax," was intended by the Legislature to except from the tax, not only legally adopted children, but the descendants of such children, and the tax cannot be assessed upon bequests to such descendants. *In re Cupples Estate*, 465.
9. _____: _____: Words of Limitation. The words "legally adopted children," used in the Collateral Inheritance Tax Act, are not words of limitation, used for the purpose of excluding them from the classification of natural children, but were meant to place them in the same class as the natural children of testator or intestate, and the children of such "legally adopted children" in the same class with his "direct lineal descendants." Ib.

STATUTES AND STATUTORY CONSTRUCTION—Continued.

10. _____: Construction of Statute. A collateral inheritance tax must be imposed in clear and unambiguous words, and exceptions will be liberally construed in connection with the whole body of the law upon the subject of which it treats. Ib.
11. _____: _____: Kindred Statutes. The Collateral Inheritance Tax Statute, in a proceeding to assess the tax against children of testator's legally adopted child, will be construed in connection with the statutes relating to the adoption of children and those regulating descents and distributions of estates of decedents, upon which it depends largely for its operation, and is, to that extent, a part. Ib.
12. _____: _____: _____: Children of Adopted Child: Heir: Classified as Natural Children. The statute relating to the adoption of children (Sec. 1671, R. S. 1909) makes a child legally adopted by deed an heir of the adopting parent, with all the incidents of that relation, including the incident of the transmission of the inheritance upon the death of such child; and the Statute of Descents and Distributions (Sec. 332, R. S. 1909) makes no distinction between such an adopted child and a child by birth, but includes the adopted child in the general designation of children, and his or her descendants in the general designation of the descendants of children. Ib.
13. _____: _____: Descendant. The word "descendant" used in the statute declaring that a collateral inheritance tax cannot be imposed on the "direct lineal descendant of the testator" includes the lineal descendants of testator's legally adopted child, and cannot be limited to its common law definition, since that has, as has the definition of the word "child," been enlarged by statute to include persons who did not fall within that definition. Ib.
14. _____: Collateral Kindred: Title to Act. Neither an adopted daughter nor her children are collateral inheritors, but direct heirs. The title of the act being "an Act to tax collateral inheritances, legacies, gifts and conveyances in certain cases," and as under the Constitution the subject of the act must be clearly expressed in its title, the act cannot be held to impose a tax on a legally adopted daughter or her children, who, by the statutes relating to the adoption of children by deed and the statutes relating to descents and distributions, are not collateral inheritors, but, for purposes of inheritance, are "direct legal descendants" of the adopting parent. Ib.
15. Hog: Carcass. The statute (Sec. 4535, R. S. 1909) making it grand larceny to steal any "horse, mare, gelding, colt, filly, ass, mule, hog or neat cattle" shows on its face that it is not capable of being construed to embrace those animals when dead. State v. Hedrick, 502.
16. Variance: Question Not Raised in Trial Court. The statute (Sec. 5114, R. S. 1909) requires that the trial court be allowed an opportunity to rule on the question of a variance between the proof and the allegations in the indictment, and if the question is not raised in the trial court it cannot be ruled in the appellate court. In this case the indictment charged that the defendant by false pretense obtained "the sum of five hundred dollars lawful money" and the evidence showed that a check for that sum was the medium of payment. State v. Small, 507.
17. Assessor: City of St. Louis: City or State Office. Under the Constitution and statutes of this State and the charter of St. Louis

STATUTES AND STATUTORY CONSTRUCTION—Continued.

the assessor in said city does not derive his title to the office from the general statutes, as do assessors in other parts of the State, but from the charter framed in harmony with the Constitution. *State ex rel. v. Schramm*, 541.

18. ———: **Proviso Excepting St. Louis Out of General Statute: Enlargement to Include Said City.** The proviso of the general statute of 1900 (Sec. 11341, R. S. 1909) requiring the election at "the general election" of a county assessor in "the several counties of this State" (said proviso declaring that "this section shall not apply to the city of St. Louis"), if held to be invalid (not necessary to be decided), then the remainder of the act cannot be held to enlarge the territory embraced so as to include said city and so as to authorize the qualified voters of said city to elect an assessor at the general election in November or the Governor to appoint respondent to the office in case they do not so elect. *Ib.*
19. ———: ———: ———: **Intention as Manifested by Proviso.** Even though a proviso excepting a part of the State from the operation of a general statute be invalid, yet as it expressly excepts that part, it demonstrates the legislative intention not to apply the general provisions of the statute to the territory so excepted, and for the courts, by eliminating the proviso, to make the remainder apply to the whole State in its entirety, would be to give to the act an effect that is manifestly contrary to that intention, and would be judicial legislation. *Ib.*
20. ———: ———: ———: **Validity of Proviso.** In view of the fact that the proviso to the Assessor's Act of 1900 (Sec. 11341, R. S. 1909) expressly excepts the city of St. Louis from the operation of the act, and that the remaining part of the act cannot be enlarged to include the territory of said city or to authorize the Governor to appoint the respondent assessor for said city, it is wholly unnecessary, in a *quo warranto* to oust said appointee, to determine the constitutionality of said proviso. Yet it is certain that if the proviso is void, the whole act is void.

Held, by FARIS, J., that the proviso is not void; that long prior to the adoption of the Constitution of 1875 the city of St. Louis had been excepted from the operation of the general laws governing the election of assessors, and that Constitution did not nullify such exceptions unless they were inconsistent with the city charter or were repealed expressly or by necessary implication by some statute, and there is no such repealing statute, and the exception is embraced in the charter; and that, barring the effect of Section 11 of the Schedule, the Constitution operated with no more potency to repeal an existing special law than it did to repeal a general law; nor does the enactment of a general law *ipso facto* and necessarily repeal a local or special law, but in order to have that effect the two must be in irreconcilable conflict, or the legislative intent to prescribe one single authoritative rule must clearly appear.

Held, by WALKER, J., concurring, that the general statutes pertaining to the office of assessor would be utterly inapplicable to such an officer in the city of St. Louis, and incapable of enforcement there, and a review of them manifests a steadfast legislative purpose from the time of the adoption of the Constitution of 1875 to the present, to leave the control of the assessment of property to the city charter and ordinances; and, since a ruling that said proviso is invalid would necessitate the amendment of the entire body of the law relating to the duties of the assessor and the assessment

STATUTES AND STATUTORY CONSTRUCTION—Continued.

of property, and prior to such amendment the city would be without power to assess property for purposes of taxation, the validity of the proviso should be upheld if it can be sustained under any reasonable interpretation.

Held, by WILLIAMS, J., dissenting, with whom GRAVES, C. J., and BLAIR, J., concur, that the proviso to Sec. 11341, R. S. 1909, is unconstitutional, and that the remaining portion of the act constitutes a valid statute complete in itself and is of such character as to justify the belief and presumption that the Legislature would have enacted it even though the proviso had been omitted or its invalidity been known. *Ib.*

21. **Repealed Statute: Continued Operation Thereunder.** Sections 8060 and 8062, Revised Statutes 1909, were intended to continue in force repealed statutes until proceedings commenced thereunder may be completed. Sections 10520 to 10525, Revised Statutes 1909, under which bonds were issued by a county to build public roads, though repealed by the Act of 1917, without a saving clause, were so far kept in force by Sections 8060 and 8062 as to authorize the county court, under Section 1249, to refund the bonds by the issuance of new bonds of the denominations and bearing the rate of interest authorized by said act. *State ex rel. v. Hackman*, 600.
22. **—: —: Continued in New Enactment.** Where the purpose and operative force of an existing statute and the one repealing it are the same, differing only in minor particulars, the repealing act is to be construed as a continuation of the one repealed, and proceedings in compliance with the latter prior to its repeal and continued thereafter in conformity with the former are regular and in accordance with legislative direction. *Ib.*
23. **Refunding Debt: Within Twenty Years After Creation.** A statute authorizing the refunding of an existing indebtedness by the issuance of new bonds is not invalid because it does not require the bonds to be paid within twenty years from the time the debt was originally created. *Ib.*
24. **—: Sale of Bonds to Original Purchaser.** Under Section 1249, Revised Statutes 1909, a county has the right to refund its public road bonds whenever it can do so at a lower rate of interest, and the refunding bonds are not invalid because they were sold to the purchaser of the original bonds. *Ib.*
25. **Bank: Assignment to Trust Company.** The statute (Sec. 1084, R. S. 1909) does not prohibit a bank from assigning its assets to a trust company to liquidate its affairs and effects its retirement from business. On the contrary, it encourages such course, as an appropriate agency for carrying out the purpose, in an expeditious and inexpensive way, beneficial to both creditors and stockholders. *Trust Co. v. Tindle*, 681.

STATUTORY RAPE. See **Carnal Knowledge**.

STOLEN PROPERTY, POSSESSION. See **Possession of Stolen Property**.

STREET GRADE, APPORTIONMENT OF COST. See **Public Service Commission**.

SUMMONS. See **Process**.

TAXES AND TAXATION.

1. **City: Current Expenses: Payment of Debts of Prior Years.** Section 12 of article 10 of the Constitution gives to a city authority to levy the annual maximum rate of taxes for city purposes and to spend it all, as it sees proper, in paying its current expenses of all kinds, and it is beyond the power of the Legislature to divert those current funds to the payment of debts of prior years. *State ex rel. v. Zinc Co.*, 43.
2. **_____: _____: _____: Extra Tax.** When a city contracts a valid debt for any year, then spends for other purposes its current funds for that year, leaving such debt unpaid, it has the power, if authorized by a two-third vote, to levy a tax in excess of the annual rate for city purposes, in order to pay that debt. *Ib.*
3. **_____: New Debt.** Where by way of a compromise of a judgment against a city for debts due a water company for hydrant rentals, bonds were voted by the people to pay the amount agreed upon, the debt evidenced by the bonds, if not a new debt, was a very different debt from that evidenced by the judgment. *Ib.*
4. **_____: Sufficiency of Tax Bill: Special Tax.** The law does not require that the back tax bill shall state a full and complete cause of action for the tax. It is not necessary to its validity that it show with specific clearness the purposes for which a "special tax" and a "sewer fund tax" were levied. The real matter for consideration is whether the tax imposed under section 12 of article 10 of the Constitution is included in the term "special" tax used in section 11. *Ib.*
5. **Agricultural Lands by City: Exemption: Repeal by Legislature.** In the absence of a constitutional inhibition to the contrary (and there was none in the Constitution of 1820), the Legislature was vested with inherent power to repeal a provision in a charter granted by special act of the Legislature in 1853 forbidding the city to levy and collect taxes on lands included within an extension of its corporate boundaries unless and until said lands were laid off into lots. Said act did not create a contractual obligation on the part of the General Assembly to exempt said lands from city taxes, nor an express or implied agreement to refrain from repealing said exemption or amending said act. *State ex rel. v. Hemenway*, 187.
6. **_____: _____: Subject to Subsequent Laws.** Lands exempt from city taxation by a special charter granted in 1853 became subject to taxation for city purposes after said city became a city of the fourth class, under the general law of taxation relating to cities of such class, there being nothing in the then Constitution or in the act itself which inhibited the General Assembly from making such property subject to city taxes. *Ib.*
7. **_____: No Exemption by Subsequent Act.** Section 11335, Revised Statutes 1909, does not exempt agricultural or pastoral lands included within the corporate limits of a city which was incorporated by special act of the Legislature in 1845, amended in 1853 so as to include such lands and providing that they were not to be taxed until laid off into lots; and the General Assembly had power, under the Constitution of 1875, to enact said Section 11335, omitting such exemption therefrom. *Ib.*
8. **_____: Prospective Operation of Constitution of 1875.** The Constitution of 1875 was not intended to be so prospective in its operation as to forbid the Legislature from repealing a provision in the special charter granted to a city in 1853 exempting agricultural

TAXES AND TAXATION—Continued.

- lands within its then corporate limits from city taxes. The Constitution in effect declared that the owner of such lands should not after its adoption receive the benefit of any exemption from taxation found in said special charter. Ib.
9. ———: **No Longer Considered Within Corporate Limits.** The fact that agricultural land was brought within the city limits by legislative enactment in 1853, and that the exemption of it from city taxation was one of the inducements for bringing it in, and that subsequently the Constitution and statutes repealed that exemption, valid when made in 1853, do not constitute a sufficient reason for considering the property as no longer within the city's corporate limits. Ib.
10. **Inheritance: Children of Adopted Child.** The words "legally adopted children" found in Sec. 309, R. S. 1909, providing that "all property which shall pass by will, or by the intestate laws of this State, other than to or for the use of the father, mother, husband, wife, legally adopted children, or direct lineal descendants of the testator, shall be and is subject to the payment of a collateral inheritance tax," was intended by the Legislature to except from the tax, not only legally adopted children, but the descendants of such children, and the tax cannot be assessed upon bequests to such descendants. In re Cupples Estate, 465.
11. ———: ———: **Words of Limitation.** The words "legally adopted children," used in the Collateral Inheritance Tax Act, are not words of limitation, used for the purpose of excluding them from the classification of natural children, but were meant to place them in the same class as the natural children of testator or intestate, and the children of such "legally adopted children" in the same class with his "direct lineal descendants." Ib.
12. ———: **Construction of Statute.** A collateral inheritance tax must be imposed in clear and unambiguous words, and exceptions will be liberally construed in connection with the whole body of the law upon the subject of which it treats. Ib.
13. ———: ———: **Kindred Statutes.** The Collateral Inheritance Tax Statute, in a proceeding to assess the tax against children of testator's legally adopted child, will be construed in connection with the statutes relating to the adoption of children and those regulating descents and distributions of estates of decedents, upon which it depends largely for its operation, and is, to that extent, a part. Ib.
14. ———: ———: ———: **Children of Adopted Child: Heir: Classified as Natural Children.** The statute relating to the adoption of children (Sec. 1671, R. S. 1909) makes a child legally adopted by deed an heir of the adopting parent, with all the incidents of that relation, including the incident of the transmission of the inheritance upon the death of such child; and the Statute of Descents and Distributions (Sec. 332, R. S. 1909) makes no distinction between such an adopted child and a child by birth, but includes the adopted child in the general designation of children, and his or her descendants in the general designation of the descendants of children. Ib.
15. ———: ———: **Descendant.** The word "descendant" used in the statute declaring that a collateral inheritance tax cannot be imposed on the "direct lineal descendant of the testator" includes the lineal descendants of testator's legally adopted child, and cannot be limited to its common-law definition, since that has, as

TAXES AND TAXATION—Continued.

has the definition of the word "child," been enlarged by statute to include persons who did not fall within that definition. *In re Cupples Estate*, 465.

16. ———: **Collateral Kindred: Title to Act.** Neither an adopted daughter nor her children are collateral inheritors, but direct heirs. The title of the act being "an Act to tax collateral inheritances, legacies, gifts and conveyances in certain cases," and as under the Constitution the subject of the act must be clearly expressed in its title, the act cannot be held to impose a tax on a legally adopted daughter or her children, who, by the statutes relating to the adoption of children by deed and the statutes relating to descents and distributions, are not collateral inheritors, but, for purposes of inheritance are "direct legal descendants" of the adopting parent. *Ib.*

TAXES AND TAXATION. See also **Assessor.**

TELEPHONE ASSOCIATION, PRIVATE. See **Public Service Commission.**

TRUST COMPANIES. See **Banks and Banking.**

TRUSTS AND TRUSTEES.

1. **Jurisdiction: Of Circuit Courts: Accounting: Trust Fund: Suit Against Executors.** A petition, filed by plaintiff in his individual capacity, having for its object an accounting in respect to a trust, under which he held certain property, both real and personal, conveyed to him by a testator under separate contract, to be held, managed and disposed of by plaintiff for the purpose of reimbursing himself for money advanced and services performed by him for the benefit of said testator, and naming the executors of a residuary legatee named in said testator's will as defendants, states a cause of action for equitable cognizance in the circuit court, and the jurisdiction to take the accounting does not reside in the probate court. *Johnston v. Grice*, 423.
2. ———: ———: ———: **Converse of Proposition.** The probate court has no jurisdiction to entertain a petition filed by executors under a will, asking for a decree declaring that an absolute conveyance made by testator be adjudged an equitable mortgage, and that the grantee be required to account for his stewardship as trustee thereunder; and the converse of said proposition, were the situation of the parties reversed, must be true. *Ib.*
3. ———: **Of Probate Court: Equitable Matters: Accounting.** The probate court is not a court of general equitable jurisdiction, although it may, like other courts of law, consider and determine questions of an equitable nature incident to the exercise of its statutory jurisdiction. It may settle the accounts of executors and administrators made by them in the performance of their duties as such, but not their account, involved in transactions in other capacities, whether as trustees or as individuals. *Ib.*
4. ———: ———: **Death of Beneficiary of Trust: Trustee Named as Executor.** Plaintiff was a surety on the bond of a guardian, and upon his default paid a large sum of money for him, and by way of reimbursement the guardian conveyed to him certain real estate, whereupon he promised the guardian that he would return to him whatever he could save above the debt he had been required to pay and the cost of maintenance and compensation for his service. For six years he administered the trust, after

TRUSTS AND TRUSTEES—Continued.

which the guardian died leaving a will in which plaintiff was appointed executor and two other persons were designated as residuary legatees. One of these persons assigned his interest to the other, and died leaving a will in which he named a third person as legatee and appointing two of the defendants as executors. The trustee sues in his individual capacity for an accounting of the trust estate, naming the surviving legatee under the guardian's will and the executors under the other legatee's will as defendants. *Held*, that the death of the guardian had no effect upon the plaintiff's rights or duties under the terms of the trust, although he himself was the beneficiary holding and managing the property for the purpose of paying a debt due him from the guardian, and he was subsequently named by the guardian as executor of his will, and two of the defendants are executors of the will of one of the residuary legatees named in the guardian's will. The probate court has no jurisdiction to settle the account pertaining to the trust estate, but it is one of equitable cognizance in the circuit court, since the account pertains to the execution of the trust, and not to the execution of the guardian's will or the will of said residuary legatees, neither of whom had power by will to change the terms of the trust. *Ib.*

5. **Compensation for Services.** For services rendered by a trustee under a trust which had its origin in a contract made by the testator under a will naming the trustee executor, no compensation can be allowed to him as executor. *Ib.*
6. **Equitable Mortgage: Trustee as Executor: Listed in Inventory: Title.** The fact that the trustee under a contract by which certain real estate was conveyed to him to reimburse him for moneys paid for the grantor, inventoried, as a part of the grantor's estate, a residuary interest in all the unsold property, upon his qualification as executor under the grantor's will, which named certain persons as residuary legatees, did not affect either the existence or character of the trust, or amount to a transfer of the fee. *Ib.*

VARIANCE.

Question Not Raised in Trial Court. The statute (Sec. 5114, R. S. 1909) requires that the trial court be allowed an opportunity to rule on the question of a variance between the proof and the allegations in the indictment, and if the question is not raised in the trial court it cannot be ruled in the appellate court. In this case the indictment charged that the defendant by false pretense obtained "the sum of five hundred dollars lawful money" and the evidence showed that a check for that sum was the medium of payment. *State v. Small*, 507.

VENUE.

Stealing Hog: Failure of Proof. Defendant was charged with stealing four black hogs in Reynolds County and was indicted in that county. The evidence shows that the hogs were stolen and killed in Dent County, and thereafter their carcasses were taken by defendant and two other persons into Reynolds County, where they were cleaned and divided among them. *Held*, that there was a total failure of proof. Defendant could not under the indictment be convicted of stealing the carcasses of hogs in Reynolds County, because he was not so charged. *State v. Hedrick*, 502.

WAIVER.

1. **Proof of Necessary Averment.** The plaintiff may waive proof of a necessary averment in defendant's answer by trying the case as if the proof had been made. *Burnett v. Prince*, 68.
2. **Acknowledgment of Notice.** A signing of an acknowledgment printed on the notice to take deposition, to the effect that defendant acknowledges the service of notice, waives the issue of *deditus* and all exceptions to time, etc., has no more effect than its terms import. It does not authorize the taking of depositions in a suit filed in a different place from the one mentioned in the notice. Such waiver would not confer validity on a void subpoena issued before the waiver. *Ib.*
3. **Negligence: Speed Ordinance: Invalidity: Pleading.** Where defendant pleads and relies upon a certain ordinance as a defense to plaintiff's charge of negligence, the invalidity of said ordinance should be pleaded, and if not pleaded it cannot be excluded as evidence on the ground that it is invalid. *Roper v. Greenspon*, 288.
4. **____: ____: Invalidity Raised at First Opportunity.** The invalidity of an ordinance, relied upon by defendant as a defense to plaintiff's action for negligence, like the unconstitutionality of a statute, should be raised at the first open door in the course of orderly procedure in the case, and if not so raised its invalidity is waived; and the ordinance being pleaded as a defense in the answer, the first opportunity for asserting its invalidity in this case was by an averment in the reply. *Ib.*
5. **____: ____: Conflict With State Statute..** If the answer pleads that plaintiff was guilty of contributory negligence in running his taxicab in excess of a certain speed ordinance pleaded, and plaintiff replies that the ordinance was in force and that he was not driving in excess of its speed rates, the court is not required to decide that said ordinance be excluded from evidence or any such ground. *Ib.*
6. **Mandamus: Damages: Failure to Perform Ministerial Duty: Waiver.** In an action based on the theory that plaintiff is entitled to damages which have accrued to him at common law by reason of the refusal of respondents in his mandamus suit to perform a ministerial duty, in that, as mayor and city councilmen, they refused to grant him a license to keep a dramshop, he cannot recover, because no such action existed at common law, and none has been created by statute. By asking for his writ of mandamus, relator was compelled to admit, and by operation of law did admit, that he had no adequate remedy by any other action or proceeding.
Held, by WILLIAMS, J., concurring, with whom BLAIR, J., concurs, that plaintiff, having elected to proceed by mandamus to compel the performance of a ministerial duty, thereby abandoned or waived whatever right he theretofore had to bring a common-law action for damages resulting from the original refusal of the defendants to perform such ministerial duty. *Smith v. Berryman*, 365.

WILLS.

1. **Election: Heir of Mother.** A child of the testator's widow who took no steps to enlarge the life estate given her by the will into a fee in one-half the land as authorized by statute, cannot claim title in the land as heir at law of such widow. *Ross v. Church*, 96.

WILLS—Continued.

2. **Widow's Election: Acquiescence in Will: Limitations.** In the absence of evidence to the contrary, it must be presumed that the widow, who probated her husband's will and qualified thereunder as executrix, and which gave her a life estate in all his lands, elected to take under the will; and being thus seized, she could not deal with the property in such a manner as to start the Statute of Limitations running adversely to the rights of the remaindermen. Ib.
3. **Contest: Action at Law.** A will contest is a statutory legal action triable by a jury, whose verdict, if supported by substantial evidence on the issues properly submitted, is conclusive on appeal, absent error in the trial and in the giving and refusal of instructions. *Hahn v. Hammerstein*, 248.
4. **Illegitimate Child: Right to Contest Will.** Unless the plaintiff can prove a lawful marriage between testator and his mother, either before or after his birth, and thus establish his heirship and consequent right to attack the will, he must establish, in some other way, a status giving him a financial interest in testator's estate which would be benefitted by a setting aside of the will. No such interest can arise from the fact that he is the natural but illegitimate child of the testator, for in such case he has no heritable right except through his mother. Ib.
5. _____: _____: **Financial Interest: Devisee Under Former Will.** No such financial interest in testator's estate as authorizes him to contest the will is established by a showing that he was the devisee in a former will which was taken by testator after its execution into his own possession and kept until it was destroyed by him prior to the execution of the will in contest. Ib.
6. **Testamentary Capacity: Tests.** The tests of testamentary capacity are: first, the testator must understand the ordinary affairs of his life; second, he must know both the nature and extent of his property and the persons who are the natural objects of his bounty; and, third, he must know that he is disposing of his property in the manner and to the persons mentioned in the will. Tested by these rules, the testator, aged eighty-eight, had sufficient capacity to make the will in suit. Ib.
7. _____: _____: **Application of Tests: Old Age.** A failure of memory resulting from old age or sickness, forgetfulness of the names of persons testator has known, idle questions, a requiring of the repetition of information, personal eccentricities and oddities, are not evidence of such mental disease and deterioration as render testator incapable of disposing of his property by will.
Held, by GRAVES, C. J., dissenting, that the court should not take single facts and say that each, standing alone, is insufficient to justify the submission of mental incapacity to the jury, but that if the combined circumstances tend to show incompetency, the question should be submitted to them; and that the fact that the will was made in April and the testator died in August of softening of the brain, a rather slow but progressive disease, is a strong circumstance tending to show mental incapacity. Ib.
8. _____: _____: **Old Age, Fall and Fainting Spells.** The fact that at the age of eighty-five testator made a misstep on the stairway and fell, striking on his head, the fall producing unconsciousness, and that following the fall he was subject to fainting spells, during which he could remember nothing until he got over them, and that his memory grew less distinct as his age advanced, did not de-

WILLS—Continued.

- prive him of the power to will his estate, provided after the fall he was still able to attend to his ordinary affairs as usual and otherwise at the time he actually made the will possessed the qualifications of competency as defined in the accepted test rules. *Hahn v. Hammerstein*, 248.
9. ———: ———: **Miserly Conduct.** Miserly conduct in hoarding money, or keeping it on his person or in his room, or piling it up in a safe deposit box, does not legally detract from testator's capacity to make a will. Ib.
10. ———: ———: **Mistakes in Money Calculations: Fault of Memory.** The fact that the testator was mistaken as to the amount of money he had on a certain occasion deposited in a bank was a mere fault of memory, and does tend to prove a lack of testamentary capacity. Ib.
11. ———: ———: **Coarse Habits.** Testimony that in his old age testator was occasionally very lightly clad in summer time; that at one time he was seen in a state of nudity; that when reproached about the impropriety of his dress, he replied it was hot; that he was rough, strong in mind and physical constitution, coarse in habits and unrefined in tastes, miserly in disposition and vulgar in behavior, does not tend to establish testamentary incapacity at the time of making the will. Ib.
12. ———: ———: **Apoplexy: Soundness on Date of Will: Hypothetical Questions.** The facts that a few months prior to making the will, and again a few months after, testator, eighty-eight years of age, had a fainting spell and a slight attack of apoplexy, and could give to his physician no intelligent statement of the history of his illness or of his condition, were not a sufficient basis for hypothetical questions relating to his testamentary competency propounded to experts, first, because of their intrinsic lack of probative force, and, second, because the undisputed testimony was that on the day the will was written, in pursuance to a prior appointment, he spoke freely and without reserve of his purposes in making the will, dictated its contents and approved and signed its draft, and the circumstances of his condition on that day as established by that testimony were omitted from the hypothetical questions. Ib.
13. ———: **Undue Influence.** The facts that the testator, a very old man, whose wife had long been dead, in his will disposing of an estate valued at fifty-seven thousand dollars, gave three hundred dollars to a woman who had rendered him many personal services, in consideration that she take care of his burial ground, gave the bulk of his estate to his daughter, and named her son by a former marriage as executor, who the evidence shows was chosen because of his business training and abilities and whom he placed in management of his affairs after the will was made but to whom he gave nothing, do not tend to establish undue influence on the part of any of them. Ib.
14. **Courtesy: In Property Devised by Will.** If the wife's will gives an undivided half interest in fee simple in her property to her husband, and the other undivided half interest to their children in fee simple, the husband is put to his election as to whether he will claim under the will or claim his courtesy devolved upon him by operation of law. The two claims are inconsistent, and he cannot have a half in fee simple, and a courtesy in the other half. *Held, by WILLIAMS, J., dissenting, that the intention to exclude the husband from his legal right to courtesy must be clearly expressed; if it is doubtful, he is not excluded. Moseley v. Bogy*, 319.

WILLS—Continued.

15. **Devise to Husband: Fee Simple Exclusive of Curtesy.** The first clause of the will read: "Should I die leaving surviving me my husband and a child or children, then it is my will that my whole estate, real and personal, be divided between my husband and children, in the proportion of one-half to my husband and one-half to my child or children." The third clause read: "Should I die leaving surviving me neither husband nor children, then and in such event I give, devise and bequeath my whole estate, both real and personal, to my mother, Anne E. Griffith." *Held*, that testatrix's intention was to devise to her husband a half interest in fee simple in her entire property, and a half interest in fee simple to her children, and not to devise the real estate subject to the husband's courtesy, even though the will by its terms does not attempt to dispose of his courtesy. The word "estate" did not mean the interest she had in the property, but meant that property itself; and that view is enforced by the third clause, which uses the same words to describe the property and gives her "whole estate, real and personal" to her mother, in case neither husband nor children survived her, it being clear that she intended to give a vendible fee simple title to her mother in such event.

Held (by GRAVES, C. J., concurring) that the same view is further enforced by the second clause of the will by which testatrix declared that in case of her death leaving her husband surviving, but no child or children, her "whole estate, real and personal" is given in equal parts to her husband and mother, thereby making it clear that she did not intend to make the real estate given to her mother subject to the husband's life-time enjoyment.

Held, by WILLIAMS, J., dissenting, that the husband had an estate or interest in the lands at the time the will was made, and the will by its very terms includes everything that was hers and excludes everything else; and there being no clearly expressed intention to exclude the husband's courtesy, he was not put to his election, but was entitled to hold both his estate by the courtesy and the half interest in the remainder devised to him by the will. *Ib.*

16. ———: **Election: By Putting Will Into Effect.** The husband, to whom his wife's will gave one half her property in fee simple, by presenting the will to the probate court and making the usual affidavit, by applying for letters testamentary and qualifying as executor, by filing an inventory of the estate and swearing to same, in which he set forth the real estate and listed no personal property, by his final settlement reporting that there was no personal property for distribution and being discharged, by receiving a benefit under the will which gave to him a vendible fee simple title to one-half of testatrix's property, and by thus deliberately putting the will into effect with full knowledge of his rights under it and of all the property affected by its provisions, elected to take under the will, and cannot now elect to renounce it and take his courtesy in the entire estate.

Held, by GRAVES, C. J., concurring, that a letter addressed to his daughter's lawyer in which he stated that at the time the will was probated he was informed by the court that he had "a fee simple in one half and a courtesy in the other half, as there were no conditions attached to the acceptance of the one half left me absolutely," further shows that he was claiming under the will, one half the estate in fee simple and the other half for life, and manifested his election to take under the will.

Held, by WILLIAMS, J., dissenting, (1) that the act of the husband in presenting the will for probate and acting as executor there-

WILLS—Continued.

under does not, in itself, constitute an election to claim under the will, and the fact that he was informed by the probate court when he presented the will for probate that he was entitled to one-half the estate in fee simple and to courtesy in the other half nullifies any inference of an election that may be otherwise drawn from qualifying as executor under the will; (2) that the fact that he claimed both courtesy and under the will does not of itself amount to an election to take under the will and relinquish his courtesy; and (3) that if the facts show an election they show an election to take the courtesy and not under the will, since he never received any property under the will, and there was no personality, there has been no change in the ownership or possession of any of the realty since testatrix's death, and he has claimed to be collecting the rents by right of his courtesy. *Moseley v. Bogy*, 319.

17. **Estate Tail: Title in Remainderman.** An estate tail at common law is abolished by statute, and the tenant of the fee tail becomes a life tenant, with remainders in fee simple to the person to whom the estate would first pass on the death of the first grantee. *King v. Theis*, 416.
18. **Life Estate: Joint Tenants.** Unless the testator expressly so declares in his will the devisees are not joint tenants of the life estate. Ib.

WITNESSES.

1. **Waiver: Proof of Necessary Averment.** The plaintiff may waive proof of a necessary averment in defendant's answer by trying the case as if the proof had been made. *Burnett v. Prince*, 68.
2. **Deposition: Notice.** Authority to take depositions is purely statutory, and while they may be taken conditionally, no officer, who is without a commission issued out of a court of record, has authority to take testimony or compel the attendance of witnesses by issuing subpoenas until the proper service of a proper notice of the time and place. Ib.
3. **_____: Subpoena Before Notice: Subsequent Service.** A subpoena issued before notice to take deposition is served, is issued without authority. And being unauthorized when issued, a subsequent service of the notice and subpoena at the same time will not give it validity. Ib.
4. **_____: _____: False Imprisonment.** A person who issues a writ for the arrest of another is liable for an action for false imprisonment if he is without authority to issue it. So that a Notary who issues a subpoena for a witness before service of notice to take depositions, is without authority to issue a writ of attachment for such witness on his failure to obey the subpoena, and is liable in an action for false arrest if the witness is attached. Ib.
5. **_____: Notice Naming Wrong Place.** A notice to take depositions in a suit pending in Independence, which names Kansas City instead of Independence as the place where the suit is pending, will not authorize the officer to enforce the attendance of witnesses. The statute makes the courts at the two places distinct and separate courts. Ib.
6. **_____: _____: Mitigation: Nonsuit.** Knowledge by the witness that the notice to take depositions wrongfully named Kansas City instead of Independence as the place where the suit is pend-

WITNESSES—Continued.

- ing and a concealment of that knowledge for the purpose of creating a damage suit, go to mitigation of damages in a suit for false arrest for failure to obey the subpoena, but will not authorize a nonsuit. Ib.
7. ———: ———: **Waiver.** A signing of an acknowledgment printed on the notice to take deposition, to the effect that defendant acknowledges the service of notice, waives the issue of *deditus* and all exceptions to time, etc., has no more effect than its terms import. It does not authorize the taking of depositions in a suit filed in a different place from the one mentioned in the notice. Such waiver would not confer validity on a void subpoena issued before the waiver. Ib.
8. **Contempt: Revealing Secrets of Grand Jury.** Inquiry by the grand jury of a witness as to the source of information he caused to be published in a newspaper, that a certain person had been indicted, who had not been arrested, is a legitimate and proper subject of inquiry by the grand jury. *Ex parte Hollaway*, 108.
9. ———: ———: **Reasons for Statute.** The purpose of the statute in requiring the secrets of the grand jury to be kept inviolate and in forbidding a disclosure of the fact that an indictment has been found against a person not in actual confinement or under bail, to prevent the escape of such person; but the fact that the statute forbids such revelations, is of itself sufficient reason, whether the offense charged be great or small. Ib.
10. ———: ———: **Excuse: To Accommodate Newspaper Reporter.** He who violates the command of the statutes forbidding a revelation of the fact that the grand jury has found an indictment against an accused who has not been arrested or bailed, cannot justify his conduct by the fact that the person to whom under the cover of confidential friendship he gave the information was the reporter of a newspaper who desired to "scoop" his competitor in the business of obtaining and printing so-called news. Ib.
11. ———: **Refusing to Testify Before Grand Jury: Constitutional Immunity.** The constitutional provision against self-incrimination will not protect a witness before the grand jury in refusing to tell whether the information he published in his newspaper, that a certain person had been indicted, was obtained from a member of the grand jury or an officer of the court or a witness who had been before them. If any of those persons made a revelation of the information he was guilty of a misdemeanor, but a reporter who listened to the disclosure, or wrote it down, or reported it, was guilty of no offense, and cannot excuse himself from telling the grand jury which one of them gave him the information, on the ground that his answer would tend to incriminate himself—though an answer to an inquiry as to "where he got his information" might do so, but that is not decided, because he did not give his "constitutional rights" as his reason for refusal to answer that question. Ib.

Rules of the Supreme Court of Missouri

REVISED AND ADOPTED APRIL 10, 1916.

Rule 1.—Chief Justice, Duty. The Chief Justice shall be elected for a term of one and three-sevenths years, and shall superintend matters of order in the courtroom.

Rule 2.—Motions to be Written, etc. All motions shall be in writing, signed by counsel and filed of record. At least twenty-four hours notice of the filing of same, unless herein otherwise provided, shall be given to the adverse party, or his attorney.

Rule 3.—Argument of Motions. No motion shall be argued unless by the direction of the court.

Rule 4.—Diminution of Record, Suggestion after Joinder in Error. No suggestion of diminution of record in civil cases will be entertained after joinder in error, except by consent of the parties.

Rule 5.—Application for Certiorari. Whenever *certiorari* is applied for to correct a record, an affidavit shall be made thereto of the defect in the transcript sought to be supplied and at least twenty-four hours notice of such application shall be given to the adverse party or his attorney.

Rule 6.—Reviewing Instructions. To enable this court to review the action of the trial court in giving and refusing instructions it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the testimony of the witnesses shall be stated in narrative form, avoiding repetition and omitting immaterial matter.

Rule 7.—Bills of Exceptions in Equity Cases. In equity cases the entire evidence shall be embodied in the bill of exceptions; provided it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to its admissibility or legal effect; and provided further that parole evidence shall be reduced to a narrative form where this can be done and its full force and effect be preserved.

Rule 8.—Presumptions in Support of Bills of Exceptions. In the absence of a showing to the contrary, it will be presumed as a matter of fact that bills of exceptions contain all the evidence applicable to any particular ruling to which exception is saved.

Rule 9.—Making up Transcripts. Clerks of courts in making out transcripts of the record for the Supreme Court, unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause, shall not set out the original or any subsequent writ or the return thereof, but in lieu of same shall simply note the dates respectively of the issuance and execution of the summons.

SUPREME COURT RULES.

If any pleading be amended, the clerk in making out the transcript will only insert therein the last amended pleading and will set out no abandoned pleading or part of the record not called for by the bill of exceptions; nor shall any clerk insert in the transcript any matter touching the organization of the court or any continuance, motion or affidavit not made a part of the bill of exceptions.

Rule 10.—“Appellant” and “Respondent:” What They Include. Whenever the words appellant and respondent appear in these rules they shall be taken to mean and include plaintiff in error and defendant in error and other parties occupying like positions in a case.

Rule 11.—Abstracts in Lieu of Transcript, When Filed and Served. Where the appellant shall, under the provisions of section 2048, Revised Statutes 1909, file a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing, and in a like time file ten copies thereof with our clerk. If the respondent is not satisfied with such abstract, he shall deliver to the appellant an additional abstract at least fifteen days before the cause is set for hearing, and within like time file ten copies thereof with our clerk. Objections to such additional abstract shall be filed with our clerk within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the respondent in like time.

Rule 12.—Abstracts: When Filed and Served. Where a complete transcript is brought to this court in the first instance, the appellant shall deliver to the respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file ten copies thereof with our clerk not later than the day preceding the one on which the cause is set for hearing. If the respondent desires to file an additional abstract he shall deliver to the appellant a copy of same at least five days before the cause is set for hearing and file ten copies thereof with our clerk on the day preceding that on which the cause is to be heard.

Rule 13.—Abstracts: What They Shall Contain. The abstracts mentioned in Rules 11 and 12 shall be printed in fair type, be pagged and have a complete index at the end thereof, which index shall specifically identify exhibits when there are more than one, and said abstract shall set forth so much of the record as is necessary to a complete understanding of all the questions presented for decision. Where there is no controversy as to the pleadings or as to deeds or other documentary evidence it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be in narrative form except when the questions and answers are necessary to a complete understanding of the testimony. Pleadings and documentary evidence shall be set forth in full when there is any question as to the former or as to the admissibility or legal effect of the latter; in all other respects the abstract must set for a copy of so much of the record as is necessary to be consulted in the disposition of the assigned errors.

Rule 14.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases ten printed, indexed and uncertified copies of the entire record, filed and served within the time prescribed by the rules for serving abstracts, shall be deemed a full compliance with said rules and dispense with the necessity of any further abstracts.

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Rule 15.—Briefs: What to Contain and When Served. The appellant shall deliver to the respondent a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the appellant at least five days before the last named date, and the appellant shall deliver a copy of his reply brief to the respondent not later than the day preceding that on which the cause is set for hearing, and ten copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed. The brief for appellant shall distinctly allege the errors committed by the trial court, and shall contain in addition thereto: (1) a fair and concise statement of the facts of the case without reiteration, statements of law, or argument; (2) a statement, in numerical order, of the points relied on, with citation of authorities thereunder, and no reference will be permitted at the argument to errors not specified; and (3) a printed argument, if desired. The respondent in his brief may adopt the statement of appellant; or, if not satisfied therewith, he shall in a concise statement correct any errors therein. In other respects the brief of respondent shall follow the order of that required of appellant. No brief or statement which violates this rule will be considered by the court.

In citing authorities counsel shall give the names of the parties in any case cited and the number of the volume and page where the case may be found; and when reference is made to any elementary work or treatise the number of the edition, the volume, section and page where the matter referred to may be found shall be set forth.

[As amended and adopted October 23, 1917.]

Rule 16.—Failure to Comply with Rules 11, 12, 13, and 15. If any appellant in any civil case fail to comply with the rules numbered 11, 12, 13 and 15, the court, when the cause is called for hearing, will dismiss the appeal, or writ of error; or, at the option of the respondent continue the cause at the cost of the party in default.

Rule 17.—Costs: When Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstract filed in lieu of a complete transcript under section 2048, R. S. 1909, which fails to make a full presentation of the record necessary to be considered in disposing of all the questions arising in the cause. But in cases brought to this court by a copy of the judgment, order or decree instead of a complete transcript, and in which the appellant shall file a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same.

Where a manuscript record has been or may be filed in this court, a reasonable fee for printing an abstract of the record or the entire record in lieu of an abstract may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in cases where costs may properly be taxed for printing, as prima-facie evidence of the reasonableness thereof; and objections thereto may be filed within ten days after service of notice of the amount of such charge.

Rule 18.—Service of Abstracts and Briefs. Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgement of such opposing party or his attorney or the affidavit of the person making the service, and such evidence of service must be filed with the abstract or brief.

Rule 19.—Service of Abstracts and Briefs in Criminal Cases. Attorneys for appellants in criminal cases in which transcripts have

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been filed in the office of the clerk sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement containing apt references to the pages of the transcript, with an assignment of errors and brief of points and an argument, and serve a copy thereof upon the Attorney-General, and thereupon the Attorney-General shall, fifteen days before the day of hearing, serve defendant or his counsel wth a copy of his statement and brief.

When a criminal case shall be advanced on the docket the court shall designate the time for filing statements and briefs.

When such transcript has been filed in this court fifteen days before the first day of the term at which such case is set for hearing, the appellant or plaintiff in error shall file his statement, brief and assignments of error five days before the first day of such term, and the Attorney-General shall, on or before the first day of the term, file his brief and statement.

Hereafter no statement or brief shall be filed in a criminal case out of time, nor will counsel who violate this rule be heard in oral argument unless for a good cause shown on motion theretofore filed and ruled on before the day set for the hearing of the case.

When appellants have been allowed to prosecute their appeal as poor persons by the trial court, counsel will be permitted to file typewritten statements and briefs. In cases where the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the Attorney-General his brief and statement five days before the hearing.

Rule 20.—Taking Record from Clerk's Office. No member of the bar shall be permitted to take a record from the clerk's office.

Rule 21.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel; and the question so submitted by counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling decision to which the attention of the court was not called, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard and the motion for rehearing overruled either in division or *En Banc* no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk.

Rule 22.—Extension of Time. Hereafter in no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

Rule 23.—Notice to Adverse Party. A party, in any cause, filing a motion either to dismiss an appeal or writ of error, or to affirm the judgment, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegram, by letter, or by written notice, and shall on filing such motion, satisfy the court that such notice has been given.

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Rule 24.—Transfers to Court En Banc. A motion to transfer a cause under the provisions of the Constitution from either division to court *En Banc* must be filed within ten days after the final disposition of the cause by the division, and notice of such motion shall be given as provided in Rule 23.

Rule 25.—Return of Original Writs. Original writs or other process issued by either division of the court, or by any judge in vacation, may be made returnable to and disposed of by such division, or the Court *En Banc*, as such division or judge in vacation may order.

Rule 26.—Assignment of Motions In Civil Causes. All motions and matters in civil causes which have not been assigned by the Court *En Banc* to a division for final determination, upon the record, shall be presented to, heard and determined by the Court *En Banc*. All matters in civil causes which have been assigned to a division shall be presented to and heard and determined by such division.

Rule 27.—Assignment of Criminal Causes. All criminal causes, and matters pertaining thereto, shall be heard and determined by Division Number Two.

Rule 28.—When Appeal Is Returnable: Certificate of Judgment; Transcript. Where appeals shall be taken or writs of error sued out, the appellant shall file a complete transcript or in lieu thereof a certificate of judgment as provided by section 2048, Revised Statutes 1909, within the time provided by said section and the date of the allowance of the appeal and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term to which such appeal is returnable; and when the appellant for any reason cannot or does not file a complete transcript, he shall file within the time allowed by said section 2048 a certificate of judgment, and may thereafter file a complete transcript and an abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term, shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 2048, Revised Statutes 1909.

Rule 29.—Oral Arguments. The time allowed for oral argument and statement shall be an hour and ten minutes for appellant or plaintiff in error, or relator in original proceedings, and fifty minutes for respondent or defendant in error or respondent in original proceedings.

Rule 30.—Letters, etc., to Court. All motions, briefs, letters or communications in any wise relating to a matter pending in this court must be addressed to the clerk, who will lay them before the court in due course. Hereafter any letter or communication relating directly or indirectly to any pending matter, addressed personally or officially to any judge of this court, will be filed with the case and be open to the inspection of the public and opposing parties.

Rule 31.—Record Matters on Appeal. Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

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Hereafter no appellant need abstract record entries evidencing his leave to file, or the filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be the fact, if he make the point.

Rule 32.—Granting Original Writs. No original remedial writ, except *habeas corpus*, will be issued by this court in any case wherein adequate relief can be afforded by an appeal or writ of error, or by application for such writ to a court having in that behalf concurrent jurisdiction.

Rule 33.—Procedure as to Original Writs. Oral arguments will not be granted on applications for original remedial writs; and before such writs shall issue, the applicant therefor shall give not less than five days' notice thereof to the adverse party, or his attorney. Such notice shall be in writing, accompanied by a copy of the application for the writ, and the suggestions in support of same. The adverse party may file in this court suggestions in opposition to the issuance of the writ, a copy of which he shall, before filing, serve on the applicant. Whenever the required notice would, in the judgment of the court, defeat the purpose of the writ, it may be dispensed with. On final hearing printed abstracts and briefs shall be filed in all respects as is required in appeals and writs of error in ordinary cases. Motions for reconsideration of the court's action in refusing applications for original writs shall not be filed.

Rule 34.—Certiorari to Courts of Appeals. No writ of certiorari shall be granted to quash the judgment of a Court of Appeals on the ground that such court has failed or refused to follow the last controlling decision of the Supreme Court, unless the applicant for such writ shall give all parties to be adversely affected, or their attorneys of record, at least five days' notice of such application; and the applicant shall, in a petition of not exceeding five pages, concisely set out the issue presented to the Court of Appeals and show wherein and in what manner the alleged conflicting ruling arose, and shall designate the precise place in our official reports where the controlling decision will be found. Said petition shall be accompanied by a true copy of the opinion of the Court of Appeals complained of, a copy of the motion for rehearing or to transfer the cause to this court, a copy of the ruling of the Court of Appeals on said motion, and suggestions in support of the petition not to exceed six printed typewritten pages.

The notice to the party to be adversely affected shall be printed or typewritten, accompanied by a true copy of the petition and all exhibits and suggestions in regard thereto. The party to be adversely affected may file, on or before the date fixed by the notice, suggestions of not more than five printed or typewritten pages stating the reasons why such writ should not issue.

